(25,580)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 750.

MOUNT SAINT MARY'S CEMETERY ASSOCIATION, PLAINTIFF IN ERROR,

vs.

WILLIAM C. MULLINS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

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1 In the Supreme Court of Missouri.

19011.

W. C. MULLINS, Respondent (Defendant in Error),

vs.

MOUNT SAINT MARY'S CEMETERY ASSOCIATION et al., MOUNT SAINT Mary's Cemetery Association, Appellant (and Plaintiff in Error).

Præcipe.

To Honorable J. D. Allen, Clerk Supreme Court of Missouri:

You are requested to make up the following record to be sent to the Clerk of the Supreme Court of the United States on the writ of error heretofore allowed herein: Copy of the petition for writ of error, prayer for reversal, assignments of error, bond, writ of error, the original citation with proof of service thereof, copy of order allowing writ of error and supersedeas, and the entire printed abstract of record heretofore filed by the appellant in the above entitled cause in the Supreme Court of Missouri, being No. 19011, also all record entries in said cause in the Supreme Court, including the judgment of the Circuit Court and the order allowing an appeal to the Supreme Court, the opinion of the Supreme Court affirming the judgment, and the judgment and opinion of the Supreme Court entered thereon, also the motion for a rehearing of said cause and the motion to transfer said cause to the Court en banc, and the record entries showing the filing of said motions and the orders of the Supreme Court overruling the same, also copy of opinion of the Supreme Court on former appeal of said cause, reported in 259 Mo. 142, and opinion on first appeal, reported in 239 Mo. 681.

H. L. McCUNE,
WILLIAM MOORE,
CLARENCE S. PALMER,
Attorneys for Plaintiff in Error.

1½ STATE OF MISSOURI,
County of Jackson, ss:

William Moore, being first duly sworn states that he served the within Præcipe by delivering an exact copy of the same to Mathew A. Fyke Esq., attorney of record for the respondent and defendant in error at Kansas City, Missouri on the Fourth day of October, A. D. 1916.

WILLIAM MOORE.

Subscribed and sworn to before me this 4th day of October 1916.

[Seal Jacob E. Fair, Notary Public, Jackson County, Mo.]

JACOB E. FAIR,
Notary Public, Jackson Co., Mo.

My term expires December 27, 1919.

[Endorsed:] 19011. In Supreme Court of Missouri. W. C. Mullins, Respondent and Plaintiff in Error, vs. Mount St. Mary's Cemetery Association, Appellant, Plaintiff in Error. Præcipe for Record to Supreme Court of United States. Filed Oct. 6, 1916. J. D. Allen, Clerk. H. L. McCune, C. S. Palmer, William Moore, Att'ys.

2 In the Supreme Court of Missouri.

Be it remembered that on the 29th day of June, 1915, there was filed in the office of the Clerk of the Supreme Court of the State of Missouri a transcript of the judgment and order granting an appeal from the Circuit Court of Jackson County, Missouri, wherein W. C. Mullins was respondent (Defendant in Error) and Mount Saint Mary's Cemetery Association was appellant (Plaintiff in Error), which said Judgment and order granting an appeal is in words and figures as follows, to-wit:

3 Be it remembered that on the 48th day of the regular March Term, 1915 of the Circuit Court of Jackson County, Missouri, at Kansas City, the same being the 4th day of May 1915, the following proceedings were had and made of record before Hon. Thomas J. Seehorn, Judge of Division No. 3 in the cause entitled:

33917.

W. C. MULLINS, Plaintiff,
vs.
MOUNT SAINT MARY'S CEMETERY ASSOCIATION and the FIRST NATIONAL BANK OF KANSAS CITY, MISSOURI, Defendants.

Now on this day this cause having been regularly assigned to this division of court and the plaintiff appearing by his attorneys, and the defendant Mount Saint Mary's Cemetery Association, appearing by its attorneys, and the First National Bank of Kansas City although having been duly served with process herein, and having filed an answer herein, fails further to appear, and the jury having been waived, and all parties announcing ready for trial, the cause is taken up and submitted to the court on the pleadings and evidence, and the court finds from the evidence that the first count in plaintiff's petition is founded upon a special tax bill issued by Kansas City, Missouri, to the plaintiff W. C. Mullins, on the 12th day of October, 1904, for the sum of Seventeen Thousand Five Hundred and Ninety Eight and 28/100 ($17,598.28) dollars as a special tax against the

following described real estate in Kansas City, Jackson County, Missouri, to-wit: Part of the South East Quarter (S. E. ¼) of the North East Quarter (N. E. ¼) of Section (10) Township Forty Nine (49) Range Thirty Three (33) more particularly described as follows. Beginning at a point on the North line of said
4 Quarter Section three hundred and seventy five (375) feet east of the north west corner thereof; thence south four hundred and sixty five feet (465) thence west three hundred and thirty five feet (335), thence south and parallel with west line of said quarter section to south line thereof; thence east along said south line to the west line of Jackson avenue; thence north along the west line of Jackson avenue to the north line of said quarter section, thence west to beginning.

The court finds that said special tax bill bears interest from its date at the rate of ten (10) per cent per annum, and the court finds that there is now due upon said special tax bill the sum of Thirty Six Thousand one hundred and thirty five and 65/100 ($36,135.65) dollars, and the court finds that said sum is a special lien and charges against the above described real estate, and the court finds the issues for the plaintiff.

Wherefore it is considered, ordered and adjudged by the court that plaintiff have and recover special judgment against said real estate above described for said sum of Thirty Six Thousand One Hundred and Thirty Five and 65/100 ($36,135.65) dollars and that the same be and it hereby is declared to be a special lien and charge upon said real estate above described.

Wherefore it is considered, ordered and adjudged by the court that plaintiff recover a special judgment for said sum of Thirty Six Thousand one Hundred and Thirty Five and 65/100 ($36,135.65) dollars against said real estate and that said real estate be sold to satisfy the same, and that special execution issue therefor and for the costs of this cause.

Entry Furnished.

Second Count.

And now on this day this cause having been regularly assigned to this division of court and the plaintiff appearing by his attorneys and the defendant Mount Saint Mary's Cemetery Association, appearing by its attorneys, and the First National Bank of Kansas City
5 although having been duly served with process herein, and having filed an answer herein, fails further to appear, and the jury having been waived, and all parties having announced ready for trial, the cause as taken up and submitted to the court on the pleadings and evidence, and the court finds from the evidence that the second count in plaintiff's petition is founded upon a special tax bill issued by Kansas City, Missouri, to the plaintiff, W. C. Mullins, on the 12th day of October, 1904, for the sum of One Thousand Five Hundred and Thirty One and 71/100 ($1,531.71) dollars, as a special tax against the following described real estate in Kansas City, Jackson County, Missouri, to-wit: Part of the Southeast

Quarter (S. E. ¼) of the Northeast Quarter (N. E. ¼) of section ten (10), Township Forty Nine (49) Range Thirty Three (33) more particularly described as follows, Beginning at a point on the North line of said Quarter section three hundred and seventy five (375) feet East of the northwest corner thereof, thence south four hundred and sixty five feet (465) thence west three hundred and thirty five (335) feet thence south and parallel with west line of said quarter section to south line thereof, thence east along said south line to the west line of Jackson avenue. thence north alone the west line of Jackson Avenue to the north line of said quarter, thence to beginning.

And the court finds that said special tax bill bears interest from its date at the rate of ten (10) per cent per annum, and the court finds that there is now due on said special tax bill the sum of Three Thousand and Twelve and 59/100 ($3012.59) dollars, and the court finds that said sum is a special lien and charge against the above described real estate, and the court finds the issues for the plaintiff.

6 Wherefore it is considered, ordered and adjudged by the court that plaintiff have and recover special judgment against said real estate described for said sum of Three Thousand and Twelve and 59/100 ($3012.59) dollars, and that the same be and is hereby declared to be a special lien and charge upon said real estate above described.

Wherefore, it is considered, ordered and adjudged by the court that plaintiff recover a special judgment for said sum of Three Thousand and Twelve and 59/100 ($3012.59) dollars against said real estate and that said real estate be sold to satisfy the same, and that special execution issue therefore, and for costs.

(Entry furnished.)

On the 52nd day of the March Term 1915, the same being the 8th day of May 1915, the following further proceedings were had and made of record to-wit:

W. C. MULLINS, Plaintiff.

vs.

MOUNT SAINT MARY'S CEMETERY ASSOCIATION et al., Defendants.

Now defendant Mount Saint Mary's Cemetery Association files motion for a new trial and also motion in arrest of judgment herein.

On the 16th day of May Term 1915, the same being the 29th day of May 1915, the following further proceedings were had and made of record, to-wit:

33917.

W. C. MULLINS, Plaintiff,

vs.

MOUNT SAINT MARY'S CEMETERY ASSOCIATION et al., Defendants.

Now the motion of defendant Mount Saint Mary's Cemetery Association for a new trial of this cause is by the court heard and considered and is now by the court overruled, to which consider-
7 ation and action of the court said defendant excepts.

Now the motion of defendant Mount Saint Mary's Cemetery Association in arrest of judgment herein is by the court heard and considered and is now by the court overruled, to which consideration and action of the court said defendant excepts.

On the 33rd day of the May Term, 1915, the same being the 19th day of June 1915, the following further proceedings were had and made of record, to-wit:

33917.

W. C. MULLINS, Plaintiff,

vs.

MOUNT SAINT MARY'S CEMETERY ASSOCIATION et al., Defendants.

Now defendant Mount Saint Mary's Cemetery Association files application and affidavit for appeal from the judgment of this Court to the Supreme Court of Missouri, which said application is by the court heard and considered and is now by the court sustained and appeal is allowed to the said Supreme Court of Missouri and defendant is by the court given to on or before the 1st day of September 1915, to file its bill of exceptions herein.

Now the appeal bond in the penal sum of Ten Thousand ($10,000.00) dollars is here now filed herein, with Mount Saint Mary's Cemetery Association as principal and Massachusetts Bonding and Insurance Company as surety thereon, which said bond is by the court examined and approved and it is the order of the court that the same be and it here now is filed herein.

7½ STATE OF MISSOURI,
County of Jackson, ss:

I, James B. Shoemaker, Clerk of the Circuit Court, within and for the County, and State aforesaid, do hereby certify that the foregoing is a full, true and complete copy of the Judgment and Order Allowing Appeal in the cause entitled W. C. Mullins, plaintiff against Mount Saint Mary's Cemetery et al., defendants as the same appears of record in my office in Book No. 310 at pages No. 53, 54, 65, 88 and 114.

In Witness Whereof, I hereunto set my hand and affix the seal of said Circuit Court, at office in Kansas City, this 21st day of June, A. D. 1915.

Attest:

[SEAL.] JAMES B. SHOEMAKER, *Clerk*,
By E. M. NAIL, *Deputy*.

8 And thereafter, to-wit on December 14, 1915, the abstract of record was filed in said cause, which said abstract is in words and figures as follows:

In the Supreme Court of Missouri, October Term, 1915.

No. 19011.

W. C. MULLINS, Respondent,

v.

MOUNT SAINT MARY'S CEMETERY ASSOCIATION et al., Appellant.

Abstract of Record.

The petition in this cause was filed in the Jackson County Circuit Court on July 24, 1907, and is as follows, omitting caption:

Petition.

Plaintiff, for his cause of action against defendants, states that defendants are corporations duly incorporated according to law.

9 That Kansas City, Missouri, is a municipal corporation duly created and existing under and by virtue of the laws of the State of Missouri, and as much by its certain ordinance, No. 24197, entitled, "An ordinance to establish and cause to be constructed district sewers in Sewer District No. 218, approved November 2, 1903, provided for constructing sewer in said District No. 218; that the said city pursuant to and by virtue of said ordinance and the powers in it vested by law, duly awarded the contract for the work aforesaid, to W. C. Mullins, which contract was duly confirmed by the mayor and common council of said city; that the work aforesaid has been done and completed according to the terms of such contract by W. C. Mullins, and has been accepted by said city; that after the completion of the work aforesaid the cost thereof was duly assessed and apportioned against the land chargeable therewith, as provided by law and especially as provided by Article IX of the Charter of said city, adopted on April the 8th, 1889; that thereafter, to-wit: on the 12th day of October, 1904, the said city, acting by and through its Board of Public Works, made out and issued to said W. C. Mullins a certain special tax bill payable in four equal installments, in part payment of the cost of the work aforesaid, which bill is hereto attached, herewith filed and made a part of this petition, the contents of which is as follows, to-wit:

No. 3487.

State of Missouri.

Ordinance No. 24197.

Kansas City Special Tax Bill.

Issued on the Installment Plan.

This certifies that the following described real estate, situated in the corporate limits of Kansas City, County of Jackson, Missouri, as follows, to-wit: part of the S. E. ¼ of N. E. ¼ Sec. 10, T. 49, R. 33, more particularly described as follows: Beginning at a point on the north line of said quarter quarter, 375 feet east of northwest corner thereof, thence south 465 feet, thence west 355 feet, thence south and parallel with west line of said quarter quarter to south line thereof, thence east along said south line to the west line of Jackson Avenue, thence north along the west line of Jackson Avenue to the north line of said quarter quarter thence west to beginning, has been charged with the sum of seventeen thousand five hundred ninety-eight dollars and twenty-eight cents ($17,598.28) as a special tax for constructing district sewer in Sewer District No. 218, as provided by Ordinance No. 24197 of Kansas City, Missouri, entitled an ordinance to establish and cause to be constructed district sewer in Sewer District No. 218, approved November 2d, 1903. Said work has been completed according to contract by W. C. Mullins, contractor, to whom this special tax bill is issued in part payment therefor, and the sum mentioned has been duly assessed and apportioned against the aforesaid land, as provided by law, for its proportion of the cost of such work as a lien against said land for a period of one (1) year after the last installment specified herein shall have become due and payable, and no longer, unless within such year suit shall have been instituted to collect this tax bill, and notice of the bringing of such suit shall have been filed with the city treasurer, in which case the lien of this tax bill shall continue until the termination of such suit, and until the sale of the property under execution on the judgment establishing the same and no default of any previous installment hereinafter mentioned, shall operate to diminish the period during which such lien shall continue.

This tax bill is payable in four (4) equal installments, of four thousand three hundred ninety-nine dollars and fifty-seven cents each, on presentation of the three installment coupons hereto attached, at maturity thereof, the fourth and last installment of four thousand three hundred ninety-nine dollars and fifty-seven cents, being payable on the 31st day of May, 1908, with interest thereon as herein mentioned, on the surrender and cancellation of this tax bill. This tax bill bears interest from the date of issue at the rate of seven (7) per cent per annum, and when any installment becomes

due and collectible, as herein provided, interest thereon, and on all unpaid installments, shall be due and collectible to that date. If any installment of this tax bill or interest thereon be not paid when due, then all the remaining installments shall become due and collectible together with interest thereon at the rate of ten (10) per cent per annum from the date of issue of this tax bill, less the sum of any interest that may have already been paid on such installments. It is provided, however, that the owner of the property charged with the payment of this tax bill or the owner of any interest therein, shall have the privilege of paying the same in full at any time before the expiration of thirty (30) days from the date of issue hereof, without interest; and it is provided further, that
12 the owner of the property charged with the payment of this tax bill, or the owner of any interest therein, shall have the privilege of paying this tax bill in full at any time, by paying the interest thereon to a period of ninety (90) days after the date of such payment, unless such payment is made within less than ninety (90) days of the maturity of the next installment, and then by paying interest thereon to the date when the next installment becomes due and payable.

Given by authority of the Board of Public Works of Kansas City, Missouri, this 12th day of October, 1904.

H. M. BEARDSLEY, *President*,
By GEO. M. RANDALL.

Third Installment.

Issued for four thousand three hundred ninety-nine dollars and fifty-seven cents, being one-fourth (¼) of Special Tax Bill No. 3487, issued on the installment plan to W. C. Mullins, contractor, for constructing district sewer in Sewer District No. 218, as provided by Ordinance No. 24197 of the common council of Kansas City, approved November 2d, 1903.

This the third installment coupon is due and collectible on the 31st day of May, 1907, and bears interest at the rate of seven (7) per cent per annum from the date of issue.

Issued by authority of the Board of Public Works this 12th day of October, 1904.

H. M. BEARDSLEY.

13 Second Installment.

Issued for four thousand three hundred ninety-nine dollars and fifty-seven cents, being one-fourth (¼) of Special Tax Bill No. 3487, issued on the installment plan to W. C. Mullins, contractor, for constructing district sewer in Sewer District No. 218, as provided in Ordinance No. 24197 of the common council of Kansas City, approved November 2d, 1903.

This is the second installment coupon, is due and collectible on the 31st day of May, 1906, and bears interest at the rate of seven (7) per cent per annum, from the date of issue.

Issued by authority of the Board of Public Works this 12th day of October, 1904.

H. M. BEARDSLEY, *President,*
By GEO. M. RANDALL.

First Installment.

Issued for four thousand three hundred ninety-nine dollars and fifty-seven cents, being one-fourth (¼) of Special Tax Bill No. 3487, issued on the installment plan to W. C. Mullins, contractor, for constructing district sewer in Sewer District No. 218, as provided in Ordinance No. 24197 of the common council of Kansas City, approved November 2d, 1903.

This the first installment coupon, is due and collectible on the 31st day of May, 1905, and bears interest at the rate of seven (7) per cent per annum, from the date of issue.

14 & 15 Issued by authority of the Board of Public Works this 12th day of October, 1904.

H. M. BEARDSLEY, *President,*
By GEO. M. RANDALL.

Plaintiff states that the said district sewers were duly constructed and that thereby the said land was especially benefited and increased in value to an extent largely in excess of the sum charged against said land and represented by said special tax bill.

That the said W. C. Mullins receipted to the Board of Public Works for the tax bills issued to him for the doing of the work aforesaid on the 13th day of October, 1904; that default has been made in the payment of the first, second and third installments of said tax bill, which said installments matured May 31st, 1905, 1906 and 1907, respectively, so that the whole of said tax bill is now due and collectible; and by reason of the premises, the said land hereinbefore described in Kansas City, Missouri, is legally chargeable in favor of this plaintiff on account of the cost of the work aforesaid, with the sum of seventeen thousand five hundred ninety-nine and 28-100 dollars, with interest on such sum from the 12th day of October, 1903, at the rate of ten (10 per cent per annum; that plaintiff is now the owner and holder of the tax bill aforesaid and each and every installment thereof, and that the same is now due and unpaid; that defendants own or claim to own the land described in the said bill and hereinbefore described, or some estate or
16 interest therein. Wherefore plaintiff prays special judgment for said sum of $17598.28, with interest thereon at ten per cent from October 12, 1904, against said land and for costs.

Second Count.

Plaintiff for his cause of action against defendants states defendants are corporations duly incorporated according to law; that Kansas City, Missouri, is a municipal corporation duly created and

existing under and by virtue of the laws of the State of Missouri, and as such, by its certain Ordinance Number 28872, entitled, "An ordinance to establish and cause to be constructed district sewers in Sewer District No. 218, Sewer Division No. 3, approved June 1st, 1905, provided for constructing a district sewer in Sewer District No. 218 in said city; that the Board of Public Works of said city, pursuant to and by virtue of said ordinance and the powers in it vested by law, duly awarded the contract for the work aforesaid to W. C. Mullins, which contract was duly confirmed by the mayor and common council of said city; that the work aforesaid has been done and completed according to the terms of such contract by said W. C. Mullins, and has been accepted by said city; that after the completion of the work aforesaid the cost thereof was duly assessed and apportioned against the land chargeable therewith, as provided by law, and especially as provided by Article IX of the Chapter of said city, adopted on April the 8th, 1889; that thereafter,
17 to-wit, on the 1st day of September, 1905, the said city, acting by and through its Board of Public Works, made out and issued to said W. C. Mullins a certain special tax bill, in part payment of the cost of the work aforesaid, which bill is hereto attached herewith filed and made a part of this petition, the contents of which is as follows:

No. 3728.

Issued Under Ordinance No. 28872.

State of Missouri.

Kansas City Special Tax Bill.

This is to certify that the following described real estate situated within the corporate limits of Kansas City, County of Jackson and State of Missouri, to-wit, part of S. E. ¼ of N. E. ¼ of Sec. 10, T. 49, R. 33, beginning at a point on north line of said quarter quarter, 375 feet east of northwest corner thereof, thence south 465 feet, thence west 335 feet, thence south and parallel with west line of said quarter quarter to south line thereof, thence east along said south line to west line of Jackson Avenue, thence north along west line of Jaskson Avenue to north line of said quarter quarter, thence west to beginning (addition), has been charged with the sum of fifteen hundred thirty-one dollars and seventy-one cents.

As a Special Tax.

For constructing a district sewer in Sewer District No. 218, as provided by Ordinance No. 28872, of Kansas City, Missouri, "An ordinance to establish and cause to be constructed district
18 sewer in Sewer District No. 218, Sewer Division No. 3," approved June 1st, 1905. Said work has been completed according to contract by W. C. Mullins, contractor, to whom this tax

bill is issued, in part payment thereof, and the sum mentioned has been duly assessed and apportioned against the aforesaid land, being the exact amount chargeable against said land as provided by law for its proportion of the cost of said work, and is a lien against said land for two (2) years after the date hereof.

This tax bill bears interest at the rate of ten (10) per cent per annum from date until paid, provided, however, that the owner of the property charged with the payment of this tax bill shall have the privilege of paying the same in full at any time within thirty (30) days from date hereof, without any interest.

Given by authority of the Board of Public Works of Kansas City, Missouri, this 1st day of September, 1905.

H. M. BEARDSLEY, *President,*
By GEO. M. RANDALL.

Plaintiff states that the said sewer was constructed and that thereby the said land was specially benefited and increased in value to an extent largely in excess of the sum charged against said land and represented by said special tax bill; that all of the lots and tracts of land in said sewer district were severally benefited and enhanced in value by the construction of the said sewer and that the special benefit so sustained by each of the lots or tracts of land in
19 said sewer district bears the same proportion to the total cost of said work as the area of each of said tracts of land in said sewer district bears to the total area of all the lots and tracts of land in said sewer district.

That the said W. C. Mullins receipted to the Board of Public Works for the tax bills issued to him for the doing of the work aforesaid on the 1st day of September, 1905; and by reason of the premises the said tract of land aforesaid described as follows, to-wit, part of the southeast quarter of section ten (10) township forty-nine (49), range thirty-three (33), beginning at a point on the north line of said tract three hundred and seventy-five feet east of the northwest corner of said tract, thence south four hundred and sixty-five feet, thence west three hundred and thirty-five feet; thence south and parallel with the west line of said tract to the south line thereof, thence east along the south line of said forty acre tract to the west line of Jackson Avenue, thence north along the west line of Jackson avenue to the north line of said quarter quarter section, thence west to beginning in Kansas City, Missouri, is chargeable in favor of said plaintiff on account of the cost of the work aforesaid with the sum of fifteen hundred thirty-one ($1531) dollars and seventy-one (71) cents, with interest on such sum from the first day of September, 1905, at the rate of ten (10) per cent per annum; that plaintiff is now the legal owner and holder of said bill, and that the same is now unpaid; that defendants own or claim to own the land hereinbefore described, or some estate or interest
20 therein. Wherefore plaintiff prays special judgment against said land with interest at ten per cent from Sept. 1, 1905.

FYKE & SNIDER,
Attorneys for Plaintiff.

The second amended answer upon which the case was tried, omitting the caption, is as follows:

Second Amended Answer of Mount Saint Mary's Cemetery Association.

Comes now the defendant, Mt. St. Mary's Cemetery Association, and for its separate answer to the petition of the plaintiff, and to each and every count thereof, herein filed, admits that it is a corporation of the State of Missouri, and that it owns the land, in said petition described, which it holds as trustee for the improvement of Mt. St. Mary's Cemetery, of which said land is a part, and also for certain Orphan Asylums of Kansas City, Missouri, except however, such portions or lots thereof as it has sold and conveyed for burial lots in Mt. St. Mary's Cemetery, and it denies each and every other allegation and averment in said petition, and in every count thereof.

Wherefore, it prays to be dismissed without day and with its costs.

For a second and further answer, said defendant, Mt. St. Mary's Cemetery Association avers that the land described in said tax bill is a public cemetery, thirty-five acres in area, and that said
21 land is not connected in any way with the sewer or sewers, for the construction of which said tax bills are alleged to have been issued, and in building said sewers, there was no provision made by which drains on said land could be connected with said sewers, and that said cemetery land derives absolutely no benefit whatever from said sewers, and that no such sewers on the land of defendant were necessary or of any benefit to the said land of the defendant, or of any other land in the sewer district, and that the amount of the tax bills in this suit, and others issued at or about the time the tax bills in suit were issued, is so great as to equal or exceed the total value of the thirty-five acres of land constituting Mt. St. Mary's Cemetery and described in the tax bills in this suit, and the enforcement of the special tax bills set out in the petition amounts to taking the property of the defendants without due process of law, and is in violation of Section 30, Art. 2, of the Constitution of the State of Missouri, and of the Fourteenth Amendment of the Constitution of the United States.

For a third and further answer, said defendant alleges that the contract for said work, for which the tax bill set out in the first count was issued, entered into between plaintiff and Kansas City, Missouri, required the same to be completed within 240 days from the date of the confirmation of said contract; that said contract was confirmed December 21, 1903; that said work was not completed until September 12, 1904, more than 240 days after the date of said con-
22 firmation, and defendant alleges that said work was not done within a reasonable time, and that, therefore, said bill is void.

Further answering, defendant alleges that sewer district No. 218, in which said sewer was constructed, was established by ordinance of Kansas City, Missouri, No. 17483, approved July 30, 1903; that

said sewer district is the largest sewer district ever established in Kansas City, Missouri, in which a district sewer was built, that it extended for a distance of more than one and a half miles north and south for a part of its width, and more than one half mile east and west at its extreme width; that it contained more than 407 acres of land; that the general surface of the district sloped from the east and west to the bottom of a valley, descending from south to the north; that the property of defendant lay in a compact tract of ground and near the eastern side of said district; and that at no place did said land of defendant extend to the bottom of the valley running through said sewer district.

Said defendant alleges that at the time of the establishment of said sewer district and for many years prior thereto, the land of defendant described in plaintiff's tax bill belonged to the defendant, a cemetery corporation; that a plat subdividing a large portion of said land into lots and blocks had been duly filed in the office of the Recorder of Deeds of Jackson County; that at said time approximately the eastern half of said tract of land had been actually used for cemetery purposes, as shown by deeds and licenses to various persons for the use of lots for burial purposes and by the actual
23 occupation of the land for graves; all of which facts were known to the plaintiff herein. Defendant alleges that by the use to which said property was appropriated it was impossible that said property could at any time receive any benefit by the construction of district sewers, and that the inclusion of the same in said sewer district No. 218 was an unreasonable and oppressive exercise of the power conferred upon the Common Council in the establishment of sewer districts in said city.

Defendant alleges that subsequent to the establishment of said sewer district, and prior to the passage of the ordinance providing for the construction of the district sewer for which the tax bill described in the first count of plaintiff's petition was issued, the Common Council provided for building a joint district sewer by Ordinance No. 18157, under which ordinance and the contract thereunder awarded, a special tax bill was issued against the said land of defendant, amounting to $1,611.15, on the 28th day of November, 1902; and that by Ordinance No. —, a district sewer had been constructed in said sewer district No. 218, under which a special tax bill was issued, amounting to $9,104.00, said bill being issued under Ordinance No. —, approved —, and said tax bill being issued December 19, 1903. Defendant alleges that the passage of Ordinance No. 24197, under which the tax bill described in the first count of plaintiff's petition was issued, was, as to this defendant's property, an unreasonable exercise of the powers conferred upon the Common Council by the charter — Kansas City, and that said ordinance is
24 therefore void. Defendant alleges that by reason of the facts above set forth, no possible or potential benefits could be received by the defendant from the construction of said sewer; that no notice or hearing was given to the defendant either of the proceedings for the construction of said sewer or for the establishment of said sewer district, and that the imposition of a special assessment

against the property of the defendant under facts which render it impossible that defendant's property should receive any benefit from said work amounts to taking the property of the defendant without due process of law, and is in violation of Section 30, Article II, of the Constitution of the State of Missouri, and of the Fourteenth Amendment to the Constitution of the United States; and defendant alleges that of all of said facts the plaintiff had notice and that in his bidding for said work he added to the estimated cost of said work the estimated amount of the tax bill to be issued against the property of this defendant.

Further answering, defendant alleges that at the time of the issuance of the tax bills described in plaintiff's petition to the plaintiff, approximately the east half of the land owned by defendant was actually used and occupied for burial purposes; that the plats and records in the office of the Recorder of Deeds of Jackson County, in Kansas City, and the actual occupation of the land, showed that said land was occupied for cemetery purposes, and by actual occupation showed that in approximately one-half of the land the defendant had no beneficial interest, but that the same had passed to
25 various grantees: and defendant alleges that, while it had a superintending control over said land and possible rights of reversion therein, its beneficial interest had passed to various grantees in the part of the land at that time actually used and occupied for burial purposes; that said facts were known to the officers of the city and to the city, and that the officers of said city had no right or authority to issue a single tax bill, including therein not only the property of which the defendant had the absolute title, but also the property in which defendant had ceased to have any beneficial interest. Defendant alleges that the effect of including all the property in one special tax bill was to double the burden upon the property in which the defendant has the full title and compel this property to remove all burden from the remainder of said ground, in which the defendant has no beneficial interest and the care of which constitutes a liability against this defendant. Defendant further alleges that if any assessment could be made at all against the land of defendant, that the apportionment should have been made in two special tax bills, so that the land of which defendant still retains control might have to pay for only the proportional part of the cost of the sewer assessed against said land; that the issue of said tax bill against the whole of said land to a single tract constitutes a denial to this defendant of the equal protection of the law, and is a violation of the Fourteenth Amendment of the Constitution of the United States.

26 Wherefore, having fully answered, the defendant prays that it be dismissed without day and with its costs.

WILLIAM MOORE,
McCUNE, HARDING, BROWN AND MURPHY,
CLARENCE S. PALMER,
Attorneys for Mt. St. Mary's Cemetery Association.

The reply was a general denial.

A jury was waived by consent of the parties and the cause was tried and submitted to the Hon. Thomas J. Seehorn, in division No. 3, of said court at the March term, 1915, of said court.

The court rendered judgment in favor of the plaintiff, which judgment is set out in the bill of exceptions herein.

In due time at the same term of court and within four days after the rendition of the judgment, defendant, Mount Saint Mary's Cemetery Association filed its motion for a new trial which is set out in the bill of exceptions herein, to which reference is hereby made also its motion in arrest, which said motions were by the court overruled during the May, 1915, term of said court, to which actions of the court the defendant at the time excepted. During the same term of court this defendant filed its affidavit for an appeal, which is set out in the bill of exceptions herein, and the appeal was duly allowed to this court. At the same time the court made and
27 entered an order giving this defendant until on or before September 1, 1915, to file its bill of exceptions and on the 28th day of August, 1915, said bill of exceptions was duly signed, sealed, and made a part of the record herein.

The amount of bond for the defendant was fixed by the court at the sum of Ten Thousand Dollars and the bond was duly approved by the court and filed.

A certified copy of the judgment and the order allowing an appeal was duly filed in this court.

The bill of exceptions is as follows:

Bill of Exceptions.

Be it Remembered, that on Tuesday, the 4th day of May, 1915, at 11:45 o'clock A. M., and at the March term, 1915, of the Circuit Court of Jackson County, Missouri, at Kansas City, in Division No. 3 thereof, the above entitled cause coming on to be heard before the Honorable Thomas J. Seehorn, judge of said circuit court, a jury having heretofore been duly waived, the plaintiff appearing by his attorneys, Messrs. Fyke & Snider, by Judge Fyke; and the defendant, Mount Saint Mary's Cemetery Association, appearing by its attorneys, Mr. William Moore, Mr. Clarence S. Palmer and Judge Henry L. McCune, and the defendant, The First National Bank of Kansas City, Missouri, although having filed answer, appeared neither in person nor by attorney, the following proceedings were had, to-wit:

Whereupon the plaintiff, to sustain the issues upon his behalf then offered and introduced evidence oral and documentary in the words and figures following:

28 Judge Fyke: I believe it is admitted that the tax bill sued on in the first count was duly executed by the president of the Board of Public Works of Kansas City, Missouri, by Geo. M. Randall, who was acting under a resolution of the Board of Public Works authorizing him to sign the name of the President of the Board of Public Works to the tax bill.

Mr. Palmer: It is admitted that H. M. Beardsley was the President of the Board of Public Works of Kansas City, Missouri, and that Geo. M. Randall was duly authorized and did sign said tax bill, and, that the signature on said tax bill is that of Geo. M. Randall.

Judge Fyke: I offer in evidence Special Tax Bill No. 3487, sued on in the First Count of the Petition, the amount of the Tax Bill, on the face of it, is for $17,598.28.

Said tax bill so offered in evidence was marked Exhibit "1," and is in the words and figures following to-wit:

EXHIBIT "1."

"No. 3487.

Ordinance No. 24197.

State of Missouri.

Kansas City Special Tax Bill.

Issued on the Installment Plan.

This certifies that the following described real estate situated in the corporate limits of Kansas City, County of Jackson, Missouri, as follows, to-wit:

29 Part of S. E. ¼ of N. E. ¼ Sec. 10-49-33 more partic. desc. as follows: Be'g.at a pt. on N. line of said ¼ ¼ 375 ft. E. of N. W. Cor. thereof, th- S. 465 ft. th- W. 335 ft. th- S. & part with W. li. of said ¼ ¼ to S. li. thereof, th- E. along said S. li. to the W. li. of Jackson Ave. thence N. along the W. li. of Jackson Ave. to the N. li. of said ¼ ¼ th- W. to be'g — Addition.

Has been charged with the sum of Seventeen Thousand Five Hundred Ninety eight 17,598) Dollars, and Twenty eight (28) Cents as a Special Tax for constructing district sewers in Sewer District No. 218, as provided by Ordinance No. 24197 of Kansas City, Missouri, entitled: 'An Ordinance to establish and cause to be constructed district sewers in Sewer District No. 218,' Approved November 2nd, 1903. Said work has been completed according to contract by W. C. Mullins, Contractor, to whom this Special Tax Bill is issued in part payment therefor, and the sum mentioned has been duly assessed and apportioned against the aforesaid land, being the exact amount chargeable against said land, as provided by law for its proportion of the cost of such work as a lien against said land for a period of one (1) year after the last installment specified herein shall have become due and payable, and no longer, unless within said year suit shall have been instituted to collect this tax bill, and notice of the bringing of such suit shall have been filed with the City Treasurer, in which case the lien of this tax bill shall continue until the termination of such suit, and until the sale of the property under execution on the judgment establishing the same and

30 no default in the payment of any previous installment here-

inafter mentioned, shall operate to diminish the period during which such lien shall continue.

This Tax Bill is payable in four (4) equal installments of Four Thousand Three Hundred Ninety nine (4399) Dollars and Fifty seven (57) Cents each, on presentation of three (3) installment coupons hereto attached, at maturity thereof, the fourth and last installment of Four Thousand Three Hundred Ninety nine (4399) Dollars and Fifty seven (57) Cents, being payable on the 31st day of May, 1908, with interest thereon as herein mentioned, on the surrender and cancellation of this tax bill. This tax bill bears interest from the date of issue at the rate of seven (7) per cent. per annum, and when any installment becomes due and collectible, as herein provided, interest thereon, and on all unpaid installments, shall be due and collectible to that date. If any installments of this tax bill or interest thereon, be not paid when due, then all the remaining installments shall become due and collectible together with interest thereon at the rate of ten (10) per cent. per annum from the date of issue of this tax bill less the sum of any interest that may have already been paid on such installments. It is provided, however, that the owner of the property charged with the payment of this tax bill, or the owner of any interest therein, shall have the privilege of paying the same in full at any time before the expiration of thirty (30) days from the date of the issue hereof, without interest; and it is provided further, that the owner of the property charged
31 with the payment of this tax bill, or the owner of any interest therein, shall have the privilege of paying this tax bill in full, at any time, by paying the interest thereon to any period of ninety (90) days after the date of such payment, unless such payment is made within less than ninety days of date of maturity of the next installment and then by paying inerest thereon to the date when the next installment becomes due and payable.

Given by authority of the Board of Public Works at Kansas City, Missouri, this 12 day of Oct. 1904.

H. M. BEARDSLEY, *President,*
(Signed) By GEO. M. RANDALL."

"Third Installment.

Issued for Four Thousand Three Hundred Ninety nine Dollars and Fifty seven Cents, being one-fourth (¼) of Special Tax Bill No. 3487 issued on the installment plan to W. C. Mullins, Contractor, for constructing district sewer in Sewer District No. 218, as provided in Ordinance No. 24197 of the Common Council of Kansas City, approved November 2nd, 1903.

This the Third Installment Coupon is due on the 31st day of May, 1907, and bears interest at the rate of seven (7) per cent. per annum from the date of issue.

Issued by Authority of the Board of Public Works this 12 day Oct. 1904.

H. M. BEARDSLEY, *President,*
(Signed) By GEO. M. RANDALL."

32 On the back of Third Installment Note appears the following:

KANSAS CITY, MISSOURI.

Received payment on the third (3d) Installment of Special Tax Bill No. 3487 Ordinance No. 24197, with Interest as follows:

Third (3rd Installment ..... $.....
Interest on Third (3d) Installment ....
Interest on Fourth (4th) Installment ....

Total ..... $....."

"Second Installment.

Issued for Four Thousand Three Hundred Ninety nine Dollars and Fifty seven Cents, being one-fourth (¼) of Special Tax Bill No. 3487 issued on the installment plan to W. C. Mullins, Contractor, for constructing district sewers in Sewer District No. 218, as provided in Ordinance No. 24197 of the Common Council of Kansas City, approved November 2nd, 1903.

This the second Installment Coupon is due and collectible on the 31st day of May, 1906, and bears interest at the rate of seven (7) per cent. per annum from the date of issue.

Issued by Authority of the Board of Public Works this 12 day Oct. 1904.

H. M. BEARDSLEY, *President.*

(Signed) By GEO. M. RANDALL."

33 On the back of Second Installment Note appears the following:

KANSAS CITY, MISSOURI.

Received payment on the second (2d) Installment of Special Tax Bill No. 3487 Ordinance No. 24197, with Interest as follows:

Second (2nd) Installment ..... $.....
Interest on Second (2d) Installment ....
Interest on Third (3d) Installment ....
Interest on Fourth (4th) Installment ....

Total ..... $....."

"First Installment.

Issued for Four Thousand Three Hundred Ninety nine Dollars and Fifty seven Cents, being one-fourth (¼) of Special Tax Bill No. 3487 issued on the installment plan to W. C. Mullins, Contractor, for constructing district sewers in Sewer District No. 218, as provided in Ordinance No. 24197 of the Common Council of Kansas City, approved November 2nd, 1903.

This the First Installment Coupon is due and collectible on the 31st day of May, 1905, and bears interest at the rate of seven (7) per cent, per annum from the date of issue.

Issued by Authority of the Board of Public Works this 12 day Oct. 1904.

H. M. BEARDSLEY, *President,*

(Signed) By GEO. M. RANDALL."

34 On the back of First Installment Note appears the following:

"KANSAS CITY, MISSOURI.

Received payment on the first (1st) Installment of Special Tax Bill No. 3487 Ordinance No. 24197, with Interest as follows:

First (1st) Installment	$.....
Interest on First (1st) Installment	.....
Interest on Second (2d) Installment	.....
Interest on Third (3d) Installment	.....
Interest on Fourth (4th) Installment	.....
Total	$....."

Assignment.

——— ———, 1—.

For value received — assign this Special Tax Bill and the lien thereof in —— and — authorized to sign — name to the receipt.

——— ———.

——— ———.

Record Satisfied.

This — day of ——, 1—.

——— ———,

City Treasurer,

By ——— ———.

Cline & Emerick, Printers. 544 Delaware St.

35 B. P. W.—Form 107.

Kansas City Special Tax Bill.

Issued on the Installment Plan.

For Constructing District Sewers in Sewer District No. 218.

Registered.

No. 3487. For $17598.28.

Vol. 54, Page 423 in City Engineer's Office.

NOTICE.—This bill should be presented at the City Treasurer's office when receipted to have satisfaction entered on the record.

Receipt.

Received payment for the within account at —— This — day of —— 1—.
(Delivered Oct. 13, 1914, City Engineer.)"

Judge Fyke: The second count of the petition, based upon Special Tax Bill No. 3728, signed in the same way, H. M. Beardsley, President, by Geo. M. Randall; and it is admitted that George M. Randall was acting under a resolution of the Board of Public Works of Kansas City, Missouri, authorizing him to sign the name of the President of the Board of Public Works to said tax bill.

36 Mr. Palmer: H. M. Beardsley was President of the Board of Public Works of Kansas City, Missouri, and Geo. M. Randall was authorized to sign it, and did sign it.

Judge Fyke: I offer in evidence Special Tax Bill No. 3728, sued on in the second count of the petition. That tax bill, on the face of it, is for $1531.71.

Said Special Tax Bill No. 3728 so offered in evidence was marked Exhibit "2," and is in the words and figures following, to-wit:

EXHIBIT "2."

"State of Missouri.

(State emblem appears here.) No. 3728.

Kansas City Special Tax Bill.

Issued under Ordinance No. 28872.

This is to certify, That the following described Real Estate situated within the corporate limits of Kansas City, County of Jackson, and State of Missouri, to-wit: Lot Part of S. E. ¼ Block of Sec. 10-49-33. Beg. at a point on N. line of ¼ ¼ 375 ft. E. of N. W. Cor. thereof th- S. 465 ft. th- W. 335 ft. th- S. and parallel with W. line of said ¼ ¼ to S. line thereof the E. along said S. line to W. line Jackson Ave. Th. N. along W. line Jackson Ave. to N. line of said ¼ ¼ then W. to beg.

Addition has been charged with the sum of Fifteen Hundred Thirty one (1531) Dollars and Seventy-one (71) Cents.

37 As a Special Tax.

For constructing a district sewer in Sewer District No. 218, as provided by Ordinance No. 28872 of Kansas City, Missouri, entitled: "An Ordinance to Establish and Caused to be Constructed District Sewers in Sewer District No. 218, Sewer Division No. 3," approved June 1st, 1905.

Said work has been completed according to contract by W. C. Mullins Contractor to whom this tax bill was issued in part payment thereof, and the sum mentioned has been duly assessed and apportioned against the aforesaid land, being the exact amount chargeable against said land as provided by law, for its proportion of the cost of said work, and is a lien against said land for Two (2) years after the date hereof.

This Tax Bill bears interest at the rate of Ten (10) per cent. per annum from date until paid provided however; that the owner of the property charged with the payment of this tax bill, shall have the privilege of paying the same in full at any time within Thirty (30) days from the date hereof, without any interest.

Given by authority of the Board of Public Works of Kansas City, Missouri, This 1 day of Sep., 1905.

H. M. BEARDSLEY,
(Signed) By GEO. M. RANDALL."

Here the plaintiff rested his case.

38 *Defense.*

Whereupon the defendant, Mount Saint Mary's Cemetery Association, to sustain the issues upon its behalf, then offered and introduced evidence oral and documentary in the words and figures following, to-wit:

JOHN P. BECKER, called as a witness on the part of the defendant, Mount Saint Mary's Cemetery Association, having been duly sworn testified as follows:

Direct examination by Mr. Palmer.

Q. What official position do you hold, Mr. Becker?
A. Deputy, in the City Treasurer's office.

(By Judge Fyke):

Q. What is the name?
A. John P. Becker.

(By Mr. Palmer):

Q. Are the records of special tax bills issued by Kansas City, Missouri kept in the office of the City Treasurer?
A. Yes, sir.
Q. Have you there with you Record No. 64, page 97?
A. Yes, sir.

Mr. Palmer: That is the record of this particular tax bill.

Judge Fyke: Let me look at it. (Examining record) What is the purpose of it?

Mr. Palmer: I don't care so much about this one, (indicating on record), as I do about the other one there. I offer in evidence the

record of Special Tax Bill No. 3487, Sewer District No. 218,
39 issued October 12th, 1904, against the same property described in the Tax Bill in suit here. The tax bill is for $17,598.28.

Said record entry appearing in Record 64 at page 97, of the Records of the City Treasurer's office, so offered in evidence, was marked Exhibit "A," and is in the words and figures following, to-wit:

EXHIBIT "A."

"64

Transferred from Vol. 42, Page- 395, 396, 397, 398, 399.

Special Tax Record.

Page 97.

Date of issue October 12th 1914, with rate of interest at 7 per cent per annum therefrom. Ordinance No. 24197.

Issued to W. C. Mullins, Contractor for work done as provided by Ordinance to Sewer Dist. No. 218.

Tax Bill No. 3487.

Description of property—S. E. of N. E. Sec 10-49-33 Beg. at a pt. on N. line sd. ¼ ¼, 375 ft. E. of N. W. cor. thereof th. S. 465 ft., th. W. 335 ft., th. S. and parallel with W. line S. ¼ ¼ to S line thereof, th. E. along sd. S. line of W. line Jackson Ave. th. N. along W. line Jackson to N. line sd. ¼ ¼, th. W. to beg. 33/69.

Tax—$17598.28.

Suit com. 7/24/07. Notice filed 7/24/07. No. 848. W. C. Mullins vs. Mt. St. Mary's Cem. et al. in Circuit Court Jackson Co., Div. No."

40 (By Mr. Palmer):

Q. I will have you turn to the same volume, Record No. 64, page 417?

A. (Witness turns to page of record.)

Mr. Palmer: I introduce from Record No. 64, page 417, the entry of Tax Bill No. 3728, issued September 1st, 1905, against the property in question, $1531.71.

Said record entry appearing in Record No. 64, at page 417, of the Records of the City Treasurer's office, so offered in evidence, was marked Exhibit "B," and is in the words and figures following, to-wit:

EXHIBIT "B."

"64.

Transferred from Vol. 47, Page 891, etc.

Special Tax Record.

Page 417.

Date of issue Sept. 1 1905, with rate of interest at 10 per cent per annum therefrom. Ordinance No. 28872.

Issued to W. C. Mullins, Contractor for work done as provided by Ordinance to Sewer Dist. No. 218.

Tax Bill No. 3728.

Part S. E. of N. E. Sec. 10-49-33. Beg. at pt. on N. line sd. ¼ ¼ 375 ft. E. of N. W. cor. thereof, th. S. 465 ft., th. W. 335 ft. th. S. and parallel with W. line sd. ¼ ¼ to S. line thereof th. E. along sd. S. line to W. line Jackson Ave., th. N. along W. line Jackson Ave. to N. line sd. ¼ ¼, th. W. to beg. 33/69.

41 Tax—$1531.71.

Suit com. 7/24/07. Notice filed 7/24/07. No. 849. W. C. Mullins vs. Mt. St. Mary Cemty. et al. In Circuit Court, Jackson Co., Dist. No."

(By Mr. Palmer):

Q. Have you the record 64, page 499?

A. Yes, sir (turning to page of record).

Judge Fyke: To that we object, because the record of any other tax bill is not material in this case. I object to it as incompetent, irrelevant and immaterial.

The Court: How could that be material in this case, Mr. Palmer?

Mr. Palmer: We have set out as one of the defenses to these tax bills, that the exercise of power of the City against this particular property was unreasonable, relying on the — case, and, was an unreasonable exercise of power by the City Council in passing the ordinance. We wish to show that the same property had been assessed for a district sewer, to the amount of $9104.30. My idea was to get the matter before this court, or whatever court the case reaches, on the question of the reasonableness of the ordinance.

The Court: You make that as an offer, do you?

Mr. Palmer: Yes, sir.

The Court: Objection sustained.

To which ruling and action of the court the defendant, Mount Saint Mary's Cemetery Association, by its counsel then and there duly excepted.

Mr. Palmer: I will make a formal offer, Your Honor. I offer

to show by the record of the City Treasurer's office, volume
42 No. 64, at page 499, the entry for district sewer, tax bill No. 3350, issued December 19th, 1903, for $9104.30, against the same property involved in this suit.

Judge Fyke: Same objection.
The Court: Objection sustained.
To which ruling and action of the court the defendant, Mount Saint Mary's Cemetery Association, by its counsel then and there duly excepted.
Said record entry appearing in Record No. 64, at page 499 of the City Treasurer's office, so offered in evidence and excluded by the court, was marked Exhibit "C," and is in the words and figures following, to-wit:

EXHIBIT "C."

"64.

Transferred from Vol. 44, Page- 386-387.

Transferred from Vol. 37, Page —.

Page 499.

Special Tax Record.

Date of issue Dec. 19, 1903, with rate of interest at 7 per cent per annum therefrom. Ordinance No. 19459.
Issued to F. C. Youmans, Contractor for work done as provided by Ordinance to Sewer Dist. 218.
Tax Bill No. 3350.
Description of Property—Part S. E. of N. E. Sec. 10-49-33. Beg. at pt. on N. line sd. ¼ ¼ 375 ft. E. of N. W. cor. thereof th. S. 465 ft. th. W. 375 ft. to W. line sd. ¼ ¼ th. S. to N. W. cor. thereof th. E. along sd. S. line to W. line Jackson Ave. th. N. along W. line Jackson to N. line sd. ¼ ¼ th. W. to beg. 33/69.
43 Tax—$9,104.30.
Suit com. 5/29/08. Notice filed 5/29/08. No. 908. F. C. Youmans vs. Mt. St. Mary's Assn. In Circuit Court Jackson Co., Div. No."

(By Mr. Palmer):

Q. Have you record No. 73, at page 284, Mr. Beck?
A. Yes, sir (turning to record).
Mr. Palmer: This is a Parker-Washington tax bill, issued November 28th, 1902, for $1,611.15.

Judge Fyke: I make the same objection.
The Court: Objection sustained.
To which ruling and action of the court the defendant, Mount

Saint Mary's Cemetery Association, by its counsel, then and there duly excepted.

Mr. Palmer: Defendant, Mount Saint Mary's Cemetery Association, offers to show by record 733, page 284, entry of special tax bill for sewers, for joint district sewer, tax bill No. 12452, issued November 28th, 1902, $1,611.15, against the property involved in this suit.

Judge Fyke: Same objection.

The Court: Objection sustained.

To which ruling and action of the court the defendant, Mount Saint Mary's Cemetery Association, by its counsel, then and there duly excepted.

Said record entry appearing in Record No. 73, at page 284, of the records of the City Treasurer's office, so offered in evidence and excluded by the court, was marked Exhibit "D," and is in the words and figures following, to-wit:

44 EXHIBIT "D."

"73.

284.

Transferred from Vol. 64, Page- 423-424-425-427; Vol. 41, Page 540.

Special Tax Record.

Date of issue Nov. 28, 1902, with rate of interest at 10 per cent per annum therefrom. Ordinance No. 18157.

Issued to —— —— Contractor for work done as provided by Ordinance to Sewer. From — to — Approved —— —— Apportioned as follows:

Tax Bill No. 12452.

Description of Property—S. E. N. E. Sec. 10-49-33. Beg. at pt. on N. li. sd. ¼ ¼ 375 ft. E. of N. W. Cor. sd. ¼ ¼ Th. S. 465 ft. W. 375 ft. to W. li. sd. ¼ ¼ Th. S. to S. W. cor. sd. ¼ ¼ 34/5.

Tax—$4.10. $1,611.15.

Suit com. 11/28/04. Notice filed 11/28/04. M. McCormick vs. Mt. St. M. Cem. Assn. et al. In Circuit Court Jackson Co., Div. No.

Cross examination waived.

Witness excused.

B. W. GANTT, called as a witness on the part of the defendant, Mount Saint Mary's Cemetery Association, having been duly sworn, testified as follows:

45 Direct examination by Mr. Palmer:

Q. What official position do you have with Kansas City, Missouri, Mr. Gantt?

A. Assistant City Clerk.

POOR COPY

Q. Is the city clerk the custodian of the ordinances that are passed by the Common Council of Kansas City, Missouri?

A. Yes, sir.

Q. Have you there some of the ordinances?

A. Yes, sir. (Producing ordinances.)

Q. They are in the custody of the city clerk?

A. Yes, sir.

Mr. Palmer: I offer in evidence Ordinance No. 24197.—being an ordinance to establish and cause to be constructed district sewers in Sewer District No. 218.

Judge Fyke: That is the ordinance involved in *in* this suit?

Mr. Palmer: Yes, sir.

Judge Fyke: I don't see any objection to that.

Said Ordinance No. 24197 of Kansas City, Missouri, so offered in evidence, was marked Exhibit "E," and is in the words and figures following, to-wit:

EXHIBIT "E."

"O. K. Daniel W. Pike, City Engr.

An Ordinance to Establish and Cause to be Constructed District Sewers in Sewer District No. 218.

Be It Ordained by the Common Council of Kansas City, Missouri:

46 Section 1. That District Sewers be and the same are hereby established and shall be constructed in Sewer District No. 218, as the same was established by Ordinance No. 17483 approved August 2nd, 1901, in Sewer Division No. 3, which shall consist as follows, to-wit:

A Lateral Sewer No. 1, beginning at a point in the alley between Dickson avenue and Fifteenth (15th) street and fifteen (15) feet east of the east line of Cleveland avenue; thence east along said alley to an outlet into the District Main Sewer in Norton Avenue, with an interior diameter of 10 inches.

(Here follow provisions for lateral sewers up to No. 101, giving locations and dimensions as shown in plans.)

Said Sewers shall have all necessary manholes, catch basins, and flush-tanks, with their necessary connections, and shall be paid for in Special Tax Bills against and upon the lands in said Sewer District as provided by law, which work the Board of Public Works and Common Council deems necessary to have done for sanitary and drainage purposes. All of said sewers twenty-four (24) inches and less in interior diameter, shall be constructed of vitrified clay pipe. Said sewers more than twenty-four (24) inches in interior diameter shall be constructed of hard burned brick laid in hydraulic cement mortar, except the middle section of the inner ring of the invert, which shall be constructed of vitrified brick laid in Portland Cement mortar.

Manholes for the inspection, cleaning and ventilation of
47 said sewers shall be constructed as parts of or appurtenances to said sewers at the following points: On Lateral Sewer No. — at the west end thereof; at the center of the block between Cleveland Avenue and Norton avenue and at its intersection with the District Main Sewer.

(Here follows location of 269 manholes as shown on plans.)

Said manholes shall conform in detail to plans on file in the office of the Board of Public Works, marked Style "C" and approved June 14, 1898, modified as to provide for manhole covers Style "E" approved March 9, 1903.

Catch basins, with their necessary connections, for surface water shall be constructed as parts of or appurtenances to said sewers at the following points: At the northwest and southwest corners of Jackson and Dickson Avenues. (Here follows location of 140 catch basins as shown on plans.)

Said catch basins shall conform in detail to plans on file in the office of the Board of Public Works marked Style "D" and approved May 28, 1903. Automatic flush tanks, with their necessary water connections, for the purpose of flushing and cleansing of said sewers shall be constructed as parts of or appurtenances to said sewers at the following points: On Lateral Sewer No. 100 at the east end thereof; (here follows location of 14 flush tanks as shown on plans.)

Said flush-tanks shall conform in detail to plans on file
48 in the office of the Board of Public Works marked approved and dated May 9, 1893.

Section 2. That the Special Tax Bills to be issued for the work and improvement herein provided for shall be made payable in four equal installments, payable and collectible in all respects in compliance with Section 23, Article IX of the Charter of Kansas City, Missouri.

Section 3. Said sewers shall conform in detail to plans and specifications prepared for the construction of said sewers, said plans now on file in the office of the Board of Public Works, marked approved and dated October 29, 1903.

Section 4. All ordinances, or parts of Ordinances, in conflict with this Ordinance are, insomuch as they conflict with this ordinance, hereby repealed.

Passed, Nov. 2, 1903.

J. P. LYNCH,
Speaker Lower House of the Common Council.

Passed, Nov. 2, 1903.

GEO. M. SHELLEY,
President Upper House of the Common Council.

Attest:
BAXTER BROWN,
City Clerk.

Approved, Nov. 2, 1903.

GEORGE M. SHELLEY,
Acting Mayor.

[Seal of Kansas City (Seal), Missouri.]

18281.

This certifies that the sewers proposed to be constructed by this Ordinance conform to the system of sewers established by
49 the Board of Public Works and this ordinance is hereby approved.

BOARD OF PUBLIC WORKS,
By GEORGE M. SHELLEY, *President.*

Attest:
ROBERT E. KING, *Secretary.*

Mr. Palmer: I offer in evidence Ordinance No. 24561, of Kansas City, Missouri, which is the ordinance to confirm the contract with Mr. Mullins.

Judge Fyke: No objection to that.

Said Ordinance No. 24561, of Kansas City, Missouri, so offered in evidence, was marked Exhibit "F," and is in the words and figures following, to-wit:

24561.

EXHIBIT "F."

"An Ordinance to Conform Contract with W. C. Mullins for the Construction of District Sewers in Sewer District No. 218, provided by Ordinance No. 24197.

Be It Ordained by the Common Council of Kansas City:

Section 1. That the work provided for in the written contract dated Dec. 21st, 1903 and entered into by W. C. Mullins, as principal, and James Van Buren, Jr., and National Surety Co. as securities, with Kansas City, to do the work to be done according to Ordinance No. 24197 entitled An Ordinance to Construct District Sewers in Sewer District No. 218 approved November 2nd, 1903, be executed according to plans and specifications mentioned in said contract, and that said contract be and the same is hereby confirmed, said principal being the lowest and best bidder for doing said work.

50 Approved, Dec. 21, 1903.

GEO. M. SHELLEY,
Acting Mayor.

Passed, Dec. 21, 1903.

J. P. LYNCH,
Speaker Lower House of the Common Council.

Passed, Dec. 21, 1903.

GEO. M. SHELLEY,
President Upper House of the Common Council.

Attest:
BAXTER BROWN,
City Clerk.

[City of Kansas City (Seal), Missouri.]

City of Kansas City, Missouri.

Mr. Palmer: Ordinance No. 24197, was approved November 2nd, 1903, by Geo. M. Shelley, acting Mayor; and, Ordinance No. 24561, was approved December 21, 1903. I also offer in evidence Ordinance No. 28872, of Kansas City, Missouri, approved June 1st, 1905.

That is an ordinance for the sewer covered by your second tax bill.

Judge Fyke: No objection.

Said Ordinance No. 28872 of Kansas City, Missouri, approved June 1st, 1905, so offered in evidence was marked Exhibit "G" and is in the words and figures following, to-wit:

28872.

EXHIBIT "G."

"Approved May 3, 1905. E. A. Harper, City Engineer.

51 An Ordinance to establish and cause to be constructed District Sewers in Sewer District Number Two Hundred and Eighteen (218) in Sewer Division Number Three (3), in Kansas City, Missouri.

Be it ordained by the Common Council of Kansas City, Missouri:

Section 1.—That Lateral Sewers are hereby established and ordered to be constructed in Sewer District *District* Number two hundred and eighteen (218) in Sewer Division Number Three (3), which shall consist as follows, to-wit: (Location of nine laterals follows as shown on plans. Laterals in district but not adjacent to defendant's land.)

All of said Sewers shall be constructed of vitrified clay pipe; said sewers shall have all necessary manholes and flush tanks, with their necessary connections and shall be paid for in special tax bills against and upon the lands in said Sewer District as provided by law, to which work the Board of Public Works and the Common Council deem necessary to have done for sanitary and drainage purposes.

Manholes for the inspection, cleaning and ventilation of said sewers shall be constructed as part of or appurtenances to said sewers at the following points: (Location of 21 manholes follows as shown on plans):

Said manholes shall conform in detail to plans on file in the office of the Board of Public Works, marked Style "C," approved June 14, 1898.

Automatic Flush Tanks, with their necessary water con-
52 nections for the purpose of flushing and cleaning said sewers, shall be constructed as parts of or appurtenances to said sewers at the following points:

On Lateral Sewer Number Ninty-five (95) at the east end thereof.

On Lateral Sewer Ninety-nine (99) at the west end thereof.

Said Flush Tanks shall conform in detail to plans on file in the office of the Board of Public Works, marked, approved and dated May 9th, 1893.

Section 2.—Said sewers shall conform in detail to plans and specifications prepared for the construction of said sewers on file in the office of the Board of Public Works.

Section 3.—All ordinances, or parts of ordinances in conflict with this ordinance, are, insofar as they so conflict, hereby repealed.

This certifies that the sewers proposed to be constructed by this ordinance, conform to the system of sewers established by the Board of Public Works and this ordinance is hereby approved.

25434.

May 3, 1905.

BOARD OF PUBLIC WORKS,
By H. M. BEARDSLEY, *President.*

Attest:
[SEAL.] EVERETT ELLIOTT, *Secretary.*

Passed May 15, 1905.

H. B. MANN,
Speaker Lower House of the Common Council.

Passed May 29, 1905.

H. M. BEARDSLEY,
President Upper House of the Common Council.

Attest:
WM. CLOUGH, *City Clerk.*
[Seal of Kansas City (Seal), Missouri.]

53 Approved June 1, 1905.

J. H. NEFF, *Mayor.*

EXHIBIT "H."

"Approved. W. J. McEllerren, Ass't and Acting City Engineer.

An Ordinance to Confirm Contract with W. C. Mullins for the Construction of District Sewer in Sewer District No. 218, in Division 3, as Provided by Ordinance No. 28872.

Be it Ordained by the Common Council of Kansas City.

Section 1.—That the work provided for in the written contract dated June 24th, 1905, and entered into by W. C. Mullins, as principal, and National Surety Company, and Russell A. Algire as securities, with Kansas City, to do the work to be done according to Ordinance No. 28872 entitled An Ordinance to Construct District Sewer in Sewer District No. 218, in Sewer Division No. 3, approved June 1st, 1905, be executed according to plans and specifications mentioned in said contract and that said contract be and the same is hereby confirmed, said principal being the lowest and best bidder for doing said work.

Passed June 26, 1905.

H. B. MANN,
Speaker Lower House of the Common Council.

54 Passed June 29, 1905.

WM. M. SLOAN,
Acting President Upper House of the Common Council.

Attest:
WM. CLOUGH,
City Clerk.

Approved July 3, 1905.

[Seal of Kansas City (Seal), Missouri.]

H. M. BEARDSLEY,
Acting Mayor.

Mr. Palmer: Ordinance No. 17483: I would like to have that ordinance.

The Witness: All right.

Cross Examination waived.

Witness excused.

C. E. DONNELLY, called as a witness on the part of the defendant, Mount Saint Mary's Cemetery Association, having been duly sworn testified as follows:

Direct examination by Mr. Palmer:

Q. Mr. Donnelly, what official position do you hold with Kansas City, Missouri?

A. Chief Draftsman in the office of the City Engineer.

Q. Have you with you—Are the contracts with the contractors and the final estimates for the work deposited in the office of the City Engineer?

A. Yes, sir.

Q. Have you the contract for the construction of district sewers, in Sewer District No. 218, Ordinance No. 24561, with W. C. Mullins? Have you that contract here?

A. Yes, sir. (Producing contract.)

55 Mr. Palmer: I offer this contract in evidence. Said contract so offered in evidence, was marked Exhibit "I," and is in the words and figures following, to-wit:

EXHIBIT "I."

Contract and Specifications.

For Sewer Construction, District Sewers in Sewer District No. 218—Two Hundred and Eighteen.

N. B.—No allowance will be made for lumber left in trenches, nor for rock excavation. These items must be included in the price bid for each lineal foot of sewer laid by contractor.

O. K.
DANIEL W. PIKE,
City Engineer.

Nov. 12th, 1903.

[Board of Public Works (Seal), Kansas City, Missouri.]

Approved November 1, 1903.
BOARD OF PUBLIC WORKS.
GEORGE M. SHELLY, *President.*

Attest:
R. E. KING, *Secretary.*

Nov. 12, 1903.

56 Approximate Estimate.

8" Sewer Pipe 4198 lin. ft. Lamp holes —.
10" Sewer Pipe 34539 lin. ft. 1-in. Galvanized Iron Pipe 850 lin. ft.
12" Sewer Pipe 16303 lin. ft. Rubble Masonry laid in Natural Cement 350 cu. yds.
15" Sewer Pipe 9462 lin. ft. Rubble Masonry laid in Portland Cement — cu. yds.
18" Sewer Pipe 3833 lin. ft. 18" Sewer Pipe for Catch Basins Con. 430 lin. ft.
21" Sewer Pipe 1330 lin. ft. 15" Sewer Pipe for Catch Basin Con. 3350 lin. ft.
24" Sewer Pipe 1658 lin. ft. 140 Catch Basins, Pattern Style (D) approved May 28th, 1903.
2' 3" Brick Sewer Pipe 303 lin. ft.
2' 4" Brick Sewer Pipe 1015 lin. ft.
2' 6" Brick Sewer Pipe 1564 lin. ft. 269 Manholes Style (C) approved June 1898, so modified as to provide for manhole covers style (E) approved March 9th, 1903.

2′ 10″ Brick Sewer Pipe 378 lin. ft. Concrete made with Natural Cement 50 cu. yds.

3′ 4″ Brick Sewer Pipe 772 lin. ft. Concrete made with Portland Cement 50 cu. yds.

3′ 6″ Brick Sewer Pipe 482 lin. ft. Timber in Foundations, — ft. B. M.

— Brick Sewer Pipe. Riprap — sq. yds.

Dry Rubble Masonry — cu. yds. Loose Rock Foundations — cu. yds.

57 Flush Tanks (13) thirteen. 24″ Drain Pipe 50 lineal ft.

B. P. W.—Form 121, Kansas City, 1903.

Contract and Specifications for Constructing District Sewers in Sewer District No. (218) *Two Hundred and Eighteen.*

This agreement made and entered into this 21st day of December, 1903, by and between W. C. Mullins as principal, party of the first part, and James Van Buren, Jr., and National Surety Company, as securities, party of the second part: and Kansas City, party of the third part.

Witnesseth: That whereas, the said party of the first part is the lowest and best bidder for making, under provisions of Ordinance No. 24197, entitled, "An Or*O*rdinance No. 24197, entitled, "An Ordinance to Establish and cause to be constructed District Sewers in Sewer District No. (218) Two Hundred and Eighteen.

Approved November 2nd, 1903. The following City improvements, viz:

District Sewers in Sewer District No. 218 as provided by said Ordinance.

Now, therefore, in consideration of the payments and covenants hereinafter mentioned to be made and performed by the said third party, the said party of the first part hereby covenants and agrees to do and complete the work above mentioned in a substantial and workmanlike manner, in conformity with the plans of such work on file in the office of the City Engineer of Kansas City, in
58 strict obedience to the directions which may from time to time be given by said City Engineer or his authorized agents, and in accordance with the following:

Specifications.

Here follow detailed specifications as to manner of work not material to the issues here presented.

In Witness Whereof, the said parties of the first and second parts have hereunto set their hands and seals, respectively, and Kansas City executes this contract by her City Engineer.

W. C. MULLINS. [SEAL.]
JAS. VAN BUREN, JR. [SEAL.]
NATIONAL SURETY COMPANY. [SEAL.]
CHAS. W. LEWIS, [SEAL.]
DANIEL W. PIKE, [SEAL.]
City Engineer Thereof.

[National Surety Company (Seal) of New York.]

Attest:
JAS. VAN BUREN, JR.,
Resident Ass't Secretary, Kansas City,
by Resident Vice President.

City Comptroller's Office.

KANSAS CITY, Dec. 21st, 1903.

The Securities and Bond aforesaid are hereby approved as sufficient.

A. E. GALLAGHER,
City Comptroller.

59 City Counselor's Office.

KANSAS CITY, MO., Dec. 21st, 1903.

The foregoing Contract and Bond are in due form according to law, and are hereby approved.

(Signed) R. J. INGRAHAM,
City Counselor.

City Clerk's Office.

KANSAS CITY, MO., Dec. 21st, 1903.

The foregoing Contract and Bond have been this day confirmed by the Common Council of Kansas City.

(Signed) BAXTER BROWN,
City Clerk.

Attest:

—— ——.

(By Mr. Palmer:)

Q. Mr. Donnelly, have you here the final estimate of the work on that contract?

A. Yes, sir (producing paper).

Q. Showing the date of the acceptance, and the amount of the computation?

A. Yes, sir.

Mr. Palmer: I offer that in evidence.

Said paper or final estimate so offered in evidence was marked Exhibit "J," and is in the words and figures following, to-wit:

The details of the estimate are not material—the aggregate amount is $211,178.14.

(By Mr. Palmer:)

Q. Have you with you, Mr. Donnelly, the plans for sewer district No. 218, showing the boundaries and the sewers con-
60 tracted under Ordinance No. 24197, by Mr. Mullins?

A. Yes, sir, (producing plans).

Q. I will ask you, Mr. Donnelly, what the plans show with reference to the sewers and the grades of that territory, and the streets?

A. The plan shows the location of the sewers, the elevation of the sewers, the street grades, the profiles, and, all the accessories necessary to complete the sewer system under this contract.

Q. I will ask you if the red lines drawn with the little dashes through the center, indicate the sewers built under this particular ordinance?

A. Yes, sir.

Q. And will ask you if the figures at the street intersections, and sometimes at other places, in red figures, indicate the grades?

A. The street grades, yes, sir.

Q. The street grades. Now, Mr. Donnelly, at what—What is the southern limits of this sewer district?

A. It goes as far south as the center line of Thirtieth street.

Q. And what is the northern boundary of this sewer district—approximately?

A. Well, the north boundary is the center line of Fourteenth street.

Q. So that, from north to south—the extreme length, goes from Fourteenth street to Thirtieth street?

A. Yes, sir.

Q. Now, what is the extreme western limits of this sewer district?

A. Benton Boulevard.

Q. And what is the extreme eastern boundary of the district?

A. Cypress Avenue.

(By Judge Fyke:)

Q. The eastern line? Ain't it Jackson Avenue?

A. No, Cypress Avenue, Mr. Fyke.

61 (By Mr. Palmer:)

Q. Can you give approximately the distance of the sewer district, in miles or fraction of miles, in length and breadth?

A. I never figured that up, Mr. Palmer.

Q. Now, calling your attention to the tract marked here "Cemetery Tract" (indicating): Do you know whether that is the Mount Saint Mary's Cemetery Tract, including what we call——

A. (Interrupting.) The House of Good Shepherd.

Q. The House of Good Shepherd! Is this tract marked "Cemetery Tract" here—does that tract include the House of Good Shepherd?

A. Yes, sir.

Q. And what is the western boundary of that?

A. Cleveland Avenue.

Q. And the eastern boundary?

A. Jackson Avenue.

Q. I will ask you whether, for most of the way, the line of Jackson Avenue, the center line, is the eastern boundary of the sewer district?

A. About four-fifths of the way, yes.

Q. Now, Mr. Donnelly, where with reference to the grade and the slope there, where is—in what direction does the ground slope?
A. North.
Q. From——
A. (Interrupting.) From south to north.
Q. And with reference to east and west?
A. Well, it really slopes to the center of the district—part way.

(By Judge Fyke:)

Q. Goes west?
A. Yes, sir.

(By Mr. Palmer:)

Q. From the cemetery, it slopes west; and, from the west
62 side of the main district, it slopes east?
A. Yes.
Q. So that the cemetery property lies upon a side hill, above the low ground, at the extreme east side of the district, most of the way?
A. Yes, sir.
Q. There is no—The plans here don't show any sewer, or any lateral running through the cemetery property?
A. Yes, sir.
Q. Do you know, Mr. Donnelly, whether or not this is a sewer which is the largest sewer district, this district, ever built in Kansas City?

Judge Fyke: I submit that that is wholly immaterial, the size of the thing!
The Court: Let him answer.

A. It is the largest, yes, sir.

(By Mr. Palmer:)

Q. I would like to have you give us the approximate distance across it each way, Mr. Donnelly?

(After discussion between counsel).

(By Mr. Palmer:)

Q. Mr. Donnelly, I will ask you if the boundary lines of the district is shown?
A. I think it is shown.
Q. On the plat?
A. It is shown with a red line, broken in places.
Q. Now, I will ask you what the northern and southern lines of the cemetery property are? Where is the southern line of the cemetery property?
A. The north line of 23rd street.
Q. And the northern line——
A. (Interrupting.) Will be about 20th street, producing, either way from the east or west.
63 Q. 20th street is not opened from Jackson to Cleveland?
A. Not as a full street.

Q. Upon the margin, around the plat, it shows the streets. I will ask you what is shown by the figures on the plats?

A. Those (indicating) are profiles giving the elevation and depth and distances of different lateral sewers.

Q. The double red lines show the sewer, does it, and, the irregular lines showing the approximate surface of the ground to the corresponding place (indicating on plat)?

A. Yes, sir.

Q. And the manhole being indicated by a sort of a truncated cone?

A. Yes, sir.

Mr. Palmer: You may examine.

Cross-examination by Judge Fyke:

Q. Mr. Donnelly, what is the southern boundary line, you say, of the cemetery, what street?

A. The extreme southern boundary——

Q. (Interrupting.) I am——

A. (Interrupting.) Oh——

Q. (Interrupting.) Talking about in the vicinity of the sewer?

A. The cemetery.

Q. The cemetery, I mean?

A. Twenty-third Street.

Q. Twenty-third Street is the south boundary of the cemetery, is it?

A. Yes, sir.

Q. Can you tell the court whether or not a sewer was constructed along 23rd Street?

A. Yes, sir.

Q. Can you tell by looking at that map whether or not
64 that sewer was provided with manholes and catch-basins?

A. (Examining plat.) Yes, sir.

Q. How many manholes on 23rd Street?

A. Well, there was five.

Q. How many catchbasins?

A. (counting on map) Five.

Q. Now the west—The street west of the cemetery, immediately adjacent to it, is Cleveland Avenue, I believe?

A. Yes, sir.

Q. Tell the court whether a sewer was constructed along Cleveland Avenue

A. There is.

Q. Tell the court how many manholes there are in that part of the sewer?

A. Four.

Q. How many catchbasins?

A. Well, this plat shows one.

Q. One catch basin on the west?

A. Yes, sir.

Q. Where is that located?

A. At the southwest corner of 21st Street and Cleveland Avenue.

Q. Do you know the lay of the ground there, at this cemetery, whether it is low there, or not?

A. No, I do not.

Q. Was there any sewer constructed on Jackson Avenue, anywhere, adjoining this cemetery?

A. Yes, sir.

Q. For what distance?

A. (Examining plat.) About 330 feet just south of 20th Street.

Q. Are there any manholes in that part of the sewer?

A. (Examining plat): Yes, sir, there are manholes.

Q. How many?

A. Well, just one, that would be adjacent to any cemetery property.

65 Q. How many catchbasins are there?

A. One.

Q. Where is that located?

A. Near the northeast corner of the cemetery property.

Q. That would be near the curb line of Jackson Avenue, and the west curb line of Jackson Avenue?

A. Yes, sir.

Q. Do you know whether or not the ground is low and the surface water from this cemetery drains in that direction, there?

A. I couldn't tell that.

Q. Can you tell, approximately, Mr. Donnelly, the total length of the sewers constructed under this contract—how many miles?

A. I can figure it up from the final estimate.

Q. If you will, please.

A. You want me to do that?

Q. I would like to have you do that.

A. It will take some little time.

Q. Well.

A. (Witness figuring) approximately 14½ miles, sewers and catch basin connections.

Q. Come down here, Mr. Donnelly.

A. (Witness steps to counsel table).

Q. Now, you say on the north of this sewer, 20th Street is not opened through as a full street (indicating on plat)?

A. There is a passageway which is somewhat in dispute, along there.

Q. I will get you to state, whether lateral sewers are shown running up to the north line of 20th Street, where it would be, on any of the streets, between the west line of the cemetery and the other line, or, between Cleveland Avenue and Jackson Avenue?

A. They were not run within ten feet of the cemetery line.

66 Q. Tell the court, if any, how many manholes are constructed there?

A. There are four lateral sewers, and four manholes, one manhole at the end of each.

Q. Can you tell the court about how many catchbasins, altogether, were constructed under this contract, Mr. Donnelly?

A. The final estimate calls for 154 catchbasins.
Q. 154 catchbasins?
A. Yes, sir.
Q. Will you tell the court how many manholes were constructed?
A. 269.
Q. And they are distributed over the whole district?
A. Yes, sir.
Q. These, of which you speak?
A. Yes, sir.
Q. I notice over these sewers, little red marks or dots on each side of the lateral sewers. What does that indicate, Mr. Donnelly?
A. They are openings left for connections to the sewer.
Q. House connections?
A. Well, house connections and drainage of all kinds.
Q. They are what are commonly called "slants?"
A. Yes, sir.
Q. That pertains generally to the whole sewer, does it?
A. Yes, sir.
Q. Will you kindly take your seat, Mr. Donnelly?
A. (Witness resumes seat in witness chair).
Q. I wish you would give the court the amount of the final estimate for this work?
A. $211,178.14.
Q. Is it usual to make an approximate estimate before the work is let?
A. Yes, sir.
67 Q. Have you any means of telling us what that approximate estimate amounted to?
A. In money, Mr. Fyke?
Q. Yes, sir, in money?
A. No, I couldn't. We only make an approximate estimate on the feet of pipe, manholes and so forth, on the plans.
Q. The only way to get at that, would be to take the number of feet and the pipe?
A. We haven't the price.
Q. You haven't any price. But isn't there some place in the contract an estimate as to what the approximate estimate is, in money?
A. No, not that I know of.

Judge Fyke: I believe that is all, Mr. Donnelly.

Redirect examination by Mr. Palmer:

Q. Mr. Donnelly, there are—You are acquainted with the location of Elmwood Cemetery, are you?
A. Yes, sir.
Q. Do you know the fact that Elmwood Cemetery is a sewer district by itself?

Judge Fyke: I object to that as wholly immaterial, and foreign to any issue in this case.
The Court: Objection sustained.
To which ruling and action of the court the defendant, Mount

Saint Mary's Cemetery Association, by its counsel, then and there duly excepted.

Mr. Palmer: I offer to show that Elmwood Cemetery, a tract used for cemetery purposes, and Forest Hill Cemetery, a tract used
68 for cemetery purposes, in Kanses City, are made sewer districts by themselves, including no other property.

Judge Fyke: Same objection.

The Court: Objection sustained.

To which ruling and action of the court the defendant, Mount Saint Mary's Cemetery Association, by its counsel, then and there duly excepted.

(By Mr. Palmer:)

Q. Mr. Donnelly, I will ask you, as an engineer, whether there was any reason at any time why this large tract of land covered by sewer district No. 218 might not have been made in two or more separate sewer districts, instead of being included in one?

Judge Fike: I object to that as not being a matter of expert testimony; and, that is a matter solely within the province of the city council.

Mr. Palmer: I admit that the judgment of the city council goes very far; but, the supreme court has said over and over again that there are limits in making a like ordinance, as to the reasonableness of the ordinance; and I submit that it is competent to show that there is no engineering necessity why all of this land should have been included in one sewer district, as bearing upon the question whether, as to this particular property, the action of the council is reasonable.

(By the Court:)

Q. Well, I understood you to say, Mr. Donnelly, that you are not familiar with the entire district out there, personally?

A. Well, I didn't say that. I am familiar, in a way, with the topography of the ground. He was asking about the cemetery—whether it was high or low in places.

69 The Court: Let him answer the question, if he knows.

Mr. Palmer: Read the question.

(Last question read by stenographer.)

Judge Fyke: I make the further objection, that the witness has not shown himself qualified to pass judgment on it.

The Court: Objection overruled.

(By Mr. Palmer):

Q. I will ask you if you are a civil engineer, Mr. Donnelly?

A. Yes, sir.

Q. How long have you been engaged in that business?

A. Well, I have been in the city engineer's office fifteen years.

Q. And I will ask you whether during that time you have either made, or superintended the making, or checked a great many sewer plans—plans for sewers?

A. I have.

Q. I will ask you if you are familiar with the engineering features of the construction of sewers and the establishment of sewer districts?

A. I am.

Q. Now, I will ask you the question, Mr. Donnelly, whether from an engineering standpoint there was any reason why the territory included in Sewer District No. 218 might not have been made into two or more sewer districts?

A. Only it would mean the construction of another joint district sewer.

Q. That is authorized by the charter, is it not?

A. Yes, sir.

Q. Is not that the usual way—of making smaller sewer districts and providing joint sewer districts to connect them?

A. Yes, sir.

70 Q. Mr. Donnelly, just step here a minute.

A. (Witness steps to counsel table and examines plan.)

Q. I notice, with reference to the locations of the slants here upon the sewers, that usually there are slants indicated on both sides of the manholes of the sewer; I will ask you whether on the plat, on the side towards the cemetery, where there are sewers, whether there are slants towards the cemetery indicated on that plan?

A. (Examining plan.) Well, this plan is somewhat old and worn, and I can't tell whether there are slants on the east side of the sewer in Cleveland avenue, or not.

Q. Is the same true on 23rd street?

A. There are no slants left on the north side of the sewer, in 23rd street.

Q. How about the west side of the sewer on Jackson Avenue?

A. No slants are shown on the plans, on the west side of the sewer in Jackson Avenue.

Q. As I understood you, in answering the question for Judge Fyke, those indications (indicating) indicate the slants that are left in the sewer pipe and covered up, so that they are easily removable in case that connections with the sewer are desired?

A. Yes, sir.

Mr. Palmer: That is all.

Recross-examination by Judge Fyke:

Q. Do you or do you not know, Mr. Donnelly, that when plumbers come in contact with sewer where there is no slants, that they frequently make the connections themselves?

A. Yes, sir.

Q. That is practical, is it?

A. Yes, sir.

71 Q. Suppose there are no houses on this cemetery ground to be connected to the sewer?

A. Well, I think the House of the Good Shepherd is there.

Q. There is no connection shown on this plan to the House of the Good Shepherd, is there?

A. Not that I know of.

Q. The fact is, that the House of the Good Shepherd is connected with this sewer, isn't it?

A. I don't know.

Mr. Palmer: That House of the Good Shepherd is a separate property, and is not included in these tax bills.

Judge Fyke: Yes, that is not included. They paid their tax bills.

Mr. Palmer: And they use it.

Judge Fike: If you do the same, you can use it. That is all, Mr. Donnelly.

Witness excused.

Mr. Palmer: We want to offer this plat in evidence.

Said plat or plans so offered in evidence was marked Exhibit "K," and is in the words and figures, lines and drawings, to-wit:

(Owing to the unwieldly size of the plat, and with the consent of counsel for respondent, the duplication of the plat is omitted and a copy will be furnished for the use of the court.)

72 Mr. Palmer: Your Honor, there is certain documentary evidence that we will read from the case appealed to the supreme court. I understood from Judge Fyke, over the 'phone, that there was no objection to our using the bill of exceptions, as being more convenient, instead of the documents themselves.

I first offer in evidence, from pages 25, beginning near the bottom of page 25, with the word "Charter," and ending at the bottom of page 37, of the bill of exceptions, in the case of Mullins against these defendants, heard in the supreme court. This is the pro forma decree of the Circuit Court of Jackson County, Missouri; and the Articles of Agreement of the Mount Saint Mary's Cemetery Association, the defendant; and the by-laws of the Cemetery Association.

Judge Fyke: That includes down to the bottom of page 37?

Mr. Palmer: First, I make the offer down to the bottom of page 31, simply the charter and the pro forma decree, and the endorsement of record of the same; and next, I will offer in evidence the by-laws contained on pages 32 to 37, inclusive, in the same bill of exceptions.

Said portions of said record so offered in evidence *is* in the words and figures following, to-wit:

"Charter.

In the Circuit Court of Jackson County, State of Missouri, Held at Kansas City, October Term, 1898, Division Number Three.

73 In the Matter of the Application of MOUNT SAINT MARY'S CEMETERY ASSOCIATION for pro forma Decree of Incorporation.

The Honorable Judge of the Circuit Court of Jackson County, State of Missouri:

Your petitioners, the undersigned, holding the offices, respectively, of President, Secretary and Treasurer of Mount Saint Mary's Ceme-

tery Association, submit to the Court the Articles of Agreement, in writing, for the formation of such society for benevolent purposes, under the name of Mount St. Mary's Cemetery Association, and pray that the pro forma decree be granted thereon, constituting them a body corporate by the name above designated, in pursuance of the Statutes of the State in such case provided.

BERNARD CORRIGAN, *Pres.*
C. M. CONLON, *Sec'y.*
JOHN J. GLENNON, *Treas.*

Articles of Agreement of Mount St. Mary's Cemetery Association.

For the purpose of incorporation under the provisions of Article X of Chapter 42 of the Revised Statutes of the State of Missouri (1889), the undersigned hereby associate themselves by articles of agreement to the effect following, that is to say:

74 Article First. There is hereby formed a corporation, the benevolent and charitable object of which shall be, under the name of Mount Saint Mary's Cemetery Association, to establish, protect and maintain Roman Catholic Cemeteries in the County of Jackson, State of Missouri. It shall be located at Kansas City, in the State of Missouri. It may acquire or obtain in any legal manner cemeteries or tracts of land to be used as cemeteries, may extend, improve and beautify the same; may subdivide the same into lots, and may control, manage and sell the same, and convey or dispose of the same under such regulations and restrictions as by said association may be deemed proper, and may receive from lot owners money or property for keeping lots in order.

Article Second. It shall have no capital stock, and all its property and the proceeds of the sale thereof, and all investments made shall constitute forever a trust fund specifically dedicated to the purchase and improvement of cemetery grounds, and keeping them durably and suitably inclosed and in repair, and in aid of Catholic Orphan Asylums as provided for by By-Laws, numbered 9, annexed hereto.

Article Third. Its affairs shall be managed and controlled by a board of Directors consisting of eleven (11) members of said association, or those who shall become such by the action of said Board of Directors.

Article Fourth. It shall exist for a period of nine hundred and ninety-nine (999) years.

Article Fifth. It shall be governed by the following By-Laws until otherwise provided) hereto attached.

75 Article Sixth. All contracts and conveyances, and all other transactions in which the expenditure of money is involved, shall be approved by the Board of Directors and signed by the President, and the association shall have a corporate seal, which shall be when used, attested by the secretary of the association.

Article Seventh. The articles of association of this corporation and these and its future By-Laws may be altered or amended or repealed at any regular meeting of the Board of Directors, upon their present adoption by a vote of two-thirds of the members present. But notices

of such alteration, repeal or amendment shall be given at a regular meeting, and shall be laid over until the next regular meeting before action is taken thereon.

Article Eighth. These articles of association and incorporation are for the purpose of the re-incorporation of the society incorporated under the same name, at the regular October term, A. D. 1877, of the Circuit Court of Jackson County, State of Missouri, and on the third (3rd) day of December, A. D. 1877, and is signed by the surviving members of said association who, with others, constitute the charter members of this association and whose names are respectively attached hereto, it is also the purpose of this corporation that the re-incorporated association shall be the successor of the former one, with all its rights and privileges, and it is hereby agreed and directed that the surviving members of the directors of the former association,
as trustees thereof, shall make proper and formal conveyance
76 and transfer to the re-incorporated association, by its corporate name of all the property of every kind whatsoever, including all books and papers subject only to the rights of creditors, if any, or any person having or holding claim against the old association now expired by limitation.

Know all men by these presents that under and in pursuance of the provisions of Article X of Chapter 42 of the Revised Statutes of Missouri (1899), we, the undersigned, composed of the surviving members of the Mount St. Mary's Cemetery Association, incorporated under the statute on the third day of December, A. D. 1877, and of their successors, and of the new members of the present association for themselves, associates and successors, hereby constitute and declare themselves to be a body corporate under the name of Mount Saint Mary's Cemetery Association for the object set forth herein.

In witness whereof we have hereunto set our hands and seals this day of November, A. D. 1898.

JOHN J. GLENNON. [SEAL.]
THOMAS SHEEHY. [SEAL.]
PATRICK KEATING. [SEAL.]
TIMOTHY MULVIHILL. [SEAL.]
JAMES BURNS. [SEAL.]
BERNARD CORRIGAN. [SEAL.]
PATRICK H. MADDEN. [SEAL.]
WM. A. KELLY. [SEAL.]
THOMAS McNAMARA. [SEAL.]
DANIEL O'FLAHERTY. [SEAL.]
THOMAS GREEN. [SEAL.]

77 *Decree, December* 24, 1898.

In the Matter of the Incorporation of Mount Saint Mary's Cemetery Association.

Now at this day the petition of Bernard Corrigan, Charles M. Conlon and John J. Glennon, holding the offices respectively of

president, secretary and treasurer of the said proposed corporation coming on to be heard and it being shown to the court that said petition has remained on file in the office of the clerk of this court for at least three days after said petition had been presented to this court the court doth proceed to examine the same and to make inquiry concerning the premises and upon due consideration the court is of the opinion that such articles of agreement and the purposes of the association mentioned therein, including the reincorporation of the old association of the same corporate name and the transfer of the property of the old association to the proposed new association, subject to the condition named in the new charter herein prayed for, come properly within the purview of Article X of Chapter 42 of the Revised Statutes of Missouri (1889), and are not inconsistent with the Constitution and Laws of the United States, or of this state.

It is therefore considered by the court, and it is so ordered and adjudged, that the prayer of said petition be granted and that the transfer of property of the old association to the new association of the same name, upon the conditions mentioned in said new articles is hereby sanctioned and directed, and that the reincorpo-
78 rated association under the name of Mount Saint Mary's Cemetery Association be and the same is hereby declared to be a corporation duly organized and existing under and by virtue of the said Article X aforesaid; and that a certified copy of this order be indorsed upon or attached to said articles of association by the clerk of this court.

STATE OF MISSOURI,
County of Jackson, ss:

I, H. M. Stonestreet, Clerk of the Circuit Court of this county and state aforesaid, certify the above to be a true copy of the order of court made in the matter aforesaid, as fully as the same remains of record in my office on January 3rd, A. D. 1899, and that the original articles of agreement are attached thereto.

In testimony whereof, I hereunto set my hand and affix the seal of said court at the office in Kansas City, this 3rd day of January, A. D. 1899.

[SEAL.] H. M. STONESTREET, *Clerk.*
By W. A. CURRY, *D. C.*

In Recorder's Office.

STATE OF MISSOURI,
County of Jackson, ss:

I, the undersigned, recorder of deeds, within and for the county aforesaid, do hereby certify that the foregoing instrument of writing was on the 3d day of January, A. D. 1899, at 4 o'clock 8 minutes P. M., duly filed for record in this office, and with the certificate of acknowledgment thereon indorsed is recorded in the records of this office, in Book B No. 702, at page 1.

79 In witness whereof, I hereunto set my hand and affix the seal of said office, at Kansas City, Mo., the day and year last aforesaid.

[SEAL.] M. R. GOSSETT, *Recorder*,
By C. H. MOORE, *Deputy*.

Filed December 20, 1898.

H. M. STONESTREET, *Clk*.
A. M. ALLEN, JR., *D. C*.

Filed and copy issued January 6, 1899.

A. A. LESUEUR, *Sec'y of State*.

By-laws of Mount Saint Mary's Cemetery Association, a Corporation.

1. The Board of Directors provided for in Article 3 of the Articles of Association or Agreement of this Association, with the qualifications hereinafter mentioned and their successors as herein provided, shall be the governing body of this Association, subject only to the approval of the constituted authorities referred to in By-Law No. 2 of these By-Laws.

2. The officers of this Association shall be a President, Vice-President, Treasurer, Secretary and Superintendent; a Committee on Grounds and Finance, Committee consisting of three members each, the members of which said committee shall hold their offices respectively as follows: One of the members shall hold for one year, one for two years and one for three years, and a member shall be elected every year, and at the first election of said committees held
80 after this amendment takes effect, one of the members of each of said committee shall be elected for one year, one for two years and one for three years, or until their successors are duly elected and qualified. The Bishop of the Kansas City Diocese shall be President of the Association and he shall be ex-officio a member of all committees of the board. All other officers except the President, shall hold their offices for such term as may be fixed by a By-Law, and if not so fixed the term shall be at the will of the Board of Directors, and no member of the Board of Directors, or an officer elected by the Board, except the Secretary and Superintendent, shall receive any compensation for their services from the Association, neither shall any member have any pecuniary interest in any contract or any material used in any contract work done in the Cemetery, the aforesaid officers shall be elected by the Board of Directors at the regular meeting in December of each year, and said election shall be by ballot.

3. The President shall preside at all meetings of the Board of Directors, and shall execute all conveyances or other instruments in behalf of this Association, and generally shall perform the duties pertaining to said office. In his temporary absence the Vice-President shall act in his place.

4. The Secretary shall attend all meetings, shall record the pro-

ceedings of the Board of Directors, shall have charge of the delivery of deeds, permits, catalogues or other publications of the Board of Directors. He shall prepare, countersign and record in the
81 records of the association all deeds of conveyances of lots in the Cemetery and all other contracts to which the Association is a party, and shall insert and keep in a portfolio all plans duly made for lots for proprietors, and shall properly index the same. He shall obtain and record information as to the heirs or devises of deceased proprietors, serve all proper notices, pay over to the committee in charge of funds all moneys received by him on account of said Association, and perform such other duties as may be reasonably prescribed by the Board of Directors. He shall receive such salary as may be fixed by the Board of Directors for his services.

5. The President, Vice-President and Treasurer shall, hereafter, have the custody of all the funds of the Association and the same shall be deposited to the credit of the Association in such bank as may be designated by the Board of Directors, and the whole or any part of said funds shall not be withdrawn from said bank except by check signed by at least two of the officers hereinbefore mentioned, after the same is approved by the Board of Directors. Said officers: President, Vice-President and Treasurer shall invest the surplus money of the Association in first mortgage real estate loans by and with the approval of the Board of Directors and shall make a full report at the annual meeting of all transactions of the preceding year and of the existing state of the funds and finances of the Association, and they shall render an account at any time when it is called for by the Finance Committee or a majority of the
82 Board of Directors, of any transactions connected with their office, as custodian of the fund of the Association. All securities and other valuables which are the property of the Association shall be placed in the custody of the Finance Committee who shall keep the same in a box in some safe deposit vault, designated by the Board of Directors and each of the members of said Finance Committee shall have a key to said box, but the said box shall be opened only when two of the members of the Finance Committee are present, and the said Finance Committee shall, upon request by any members of the Board of Directors bring before said board for inspection, all securities and other valuables, if any belonging to the Association. All By-Laws or parts of By-Laws insofar as they are in conflict with the foregoing are hereby rescinded or repealed. Commissions from loans or from the sale or purchase of any property made by this board shall be paid to the party making the loan or sale, but no commissions shall be paid for loans or sale by the Cemetery Board. The President, Vice-President and Treasurer shall collect all mortgages, notes or bonds of any nature and shall deposit them to the credit of fund to which they belong. The Finance Committee shall make an inventory on all papers in their possession and furnish same to the Board of Directors.

(There is added to the By-Laws of the Association the following by-law which shall be known as No. 5 "A"):

The secretary may collect current moneys due the associa-
83 tion and out of the same may pay current bills none of which single bills shall exceed $100.00. The secretary shall not retain in his possession money in excess of $300.00. The secretary shall give a surety bond in the sum of $1,000.00 for the faithful performance of his duties, and the cost of said bond shall be paid by the association and said bond shall be approved and deposited with Finance Committee.

6. The Committee on Grounds shall consist of three members of the Board of Directors to be elected by ballot as provided by By-law 2 of these By-Laws. Said committee shall visit the Cemetery at least once a week and perform such other duties as are imposed by the By-Laws, and Rules and Regulations of the Cemetery.

7. The Finance Committee shall consist of three members to be elected by ballot as provided by By-Law 2 of these By-Laws, and it shall be the duty of said committee to examine from time to time all reports made by the Committee in charge of Funds and Secretary and books and accounts of the Association, and make their report quarterly to the Board of Directors.

8. The Board of Directors shall have power to make additional By-Laws from time to time for the government of this association, which are not inconsistent with the Constitution or Laws of the United States or of the State of Missouri. And it shall also have the power to prescribe rules and regulations from time to time gov-
erning the use and maintenance of the Cemetery grounds,
84 which shall be binding on the Association and on all lot holders in said Cemetery.

9. The Board of Directors shall have power to see to it that the Cemetery grounds and all additions and extensions thereto shall remain in the proper state of ornament and repair and may from time to time dispose of lots in said Cemetery, which shall, however, be used for no other purpose.

The surplus funds of this Association shall from time to time be used and applied to the support and relief funds needed by local Catholic orphans asylums in Jackson County, Missouri, by and with the consent of the Bishop of the Kansas City Diocese.

10. One-third of the receipts from the sale of lots shall be set aside as a Maintenance Fund, and the interest thereof devoted to the perpetual care of Cemetery. The following rules govern its management:

I. The Maintenance Fund of Mount Saint Mary's Cemetery Association shall be in the hands of a committee composed of the President, Vice-President and Treasurer of said Association and this committee shall be known as the Maintenance Fund Committee.

II. The duty of said committee shall be to loan and manage the money of the Maintenance Fund.

III. Only first mortgage real estate loans shall be accepted.

IV. All money of said Maintenance Fund shall be deposited in bank and drawn out only by majority of said Maintenance Fund Committee.

85 V. No member of Mount Saint Mary's Cemetery Association shall be allowed to borrow from the said Maintenance Fund, and no member of said Board shall be accepted as security for a loan from said Maintenance Fund, or any other Fund.

VI. All loans made from said Maintenance Fund must be ratified by the majority of the members of Mt. St. Mary's Cemetery Association at a regular meeting of the Association.

The order of business at meetings shall be as follows:

1. Meet called to order by President.
2. Roll call of members.
3. Reading of proceedings of last meeting.
4. Reports of Committees.
5. Unfinished Business.
6. New Business.
7. Adjournment.' "

Mr. Palmer: I also offer from pages 72 to 73 of the bill of exceptions,—being a transcript of the Record of the Circuit Court of Jackson County, Missouri, December 3rd, 1877.

Judge Fyke: You are offering, now, from the printed Abstract of Record for the Supreme Court?

Mr. Palmer: Yes, sir. This is the Decree of Incorporation of the Mount Saint Mary's Cemetery Association.

Said portion of said Record so offered in evidence is in the words and figures following, to-wit:

86 " 'Forty-second Day of October Term, Monday, December 3, A. D., 1877.

In the Matter of the Incorporation of Mount St. Mary's Cemetery Association.

No. 3516½.

Now at this day come Thomas Green, Peter Soden, Patrick Brennen, Redmond Sage, Patrick Donnelly, John J. Hackett, Bernard Donnelly, Sr., Patrick Keating, Thomas Sheehy, Thomas Corrigan, Thomas Reilly, Patrick McAnany and Timothy Mulvihill, by attorney, and file their petition for incorporation under the name and style of Mount St. Mary's Cemetery Association and tender to the court their articles of association as such or constitution and present a list of all their members, and upon consideration the court, being of the opinion that said articles of association are not inconsistent with the constitution or laws of the United States or of this, the State of Missouri therefore grants said petition and declares them a body politic and corporate under the name and style aforesaid and orders that said articles of association or constitution be filed and grants to said petitioners a certificate of incorporation under the

name and style of Mount St. Mary's Cemetery Association as provided in Chapter 37, Article VIII.

* * * * * * *

S. H. WOODSON, *Judge.*"

B. W. GANTT, recalled as a witness, testified further as follows:

87 Direct examination by Mr. Palmer:

Q. Have you with you Mr. Gantt, Ordinance No. 17483, entitled "An Ordinance to Establish Sewer District No. 218 in Sewer Division No. 3,"—approved August 2nd, 1901?
A. Yes, sir. (Producing paper.)

Mr. Palmer: That I offer in evidence, Mr. Fyke.
Judge Fyke: No objection at all.
Said Ordinance No. 17483, of Kansas City, Missouri, approved August 2nd, 1901, so offered in evidence, was marked Exhibit "L," and is in the words and figures following, to-wit:

EXHIBIT "L."

"O. K. Robert W. Waddell, City Engineer.

An Ordinance to Establish Sewer District No. 218, in Sewer Division No. 3.

Be it Ordained by the Common Council of Kansas City, Missouri:

Section 1. That Sewer District No. 218, in Sewer Division No. 3, be and the same is hereby established the boundary lines of which being described as follows, to-wit: Beginning at the intersection of the center line of Benton Boulevard with the center of Thirtieth (30th) Street; thence north along the center of Benton
88 Boulevard to the center of Howard Street; thence east along the center of Howard Street to the center of Agnes Avenue; thence north along the center of Agnes Avenue to the center of Twenty-fourth (24th) Street; thence east along the center of Twenty-fourth (24th) Street to the center of Bellefontaine Avenue; thence north along the center of Bellefontaine Avenue to the center of Twenty-third (23rd) Street; thence east along the center of Twenty-third (23rd) Street to the center of Walrond Avenue from the north; thence north on the prolongation of center line of Walrond Avenue to the center of Twenty-second (22nd) Street; thence north along the center of Walrond Avenue to the center of Matthews Avenue; thence east along the center of Matthews Avenue to the center of College Avenue; thence north along the center of College Avenue; thence north along the center of College Avenue to the center of Nineteenth (19th) Street; thence east along the center of Nine-

teenth (19th) Street to a point 145.97 feet east of the east line of College Avenue thence north and parallel to the east line of College Avenue to the center of Eighteenth (18th) Street; thence east along then center line of Eighteenth (18th) Street to the center of Indiana Avenue north of Eighteenth (18th) Street; thence north along the center of Indiana Avenue to the north line of Seventeenth (17th) Street east of Indiana Avenue; thence east along the said north line of Seventeenth (17th) Street to the center of Askew Avenue; thence north along the center of Askew Avenue to a point 384 feet
89 south of the south line of Fifteenth (15th) Street; thence east and parallel to the south line of Fifteenth (15th) Street to the center of Cleveland Avenue; thence north along the center of Cleveland Avenue to the center of Fourteenth (14th) Street, east of Cleveland Avenue; thence east along the center of Fourteenth (14th) Street to the east line of Norton Avenue; thence south along the east line of Norton Avenue to the north line of Sullivan Street; thence east along the north line of Sullivan Street to the center of Jackson Avenue; thence south along the center of Jackson Avenue to the north line produced west of Mitchener & Diehl Sub; thence east and parallel to the north line of Fifteenth (15th) Street to the center of Spruce Avenue; thence south to the center line of Fifteenth (15th) Street; thence east along the center of Fifteenth (15th) Street to the center of Cypress Avenue, south of Fifteenth Street; thence south along the center of Cypress Avenue to the center of Seventeenth (17th) Street; thence west along the center of Seventeenth (17th) Street to a point midway between Spruce Avenue and Kensington; thence south to the center of Twentieth (20th) Street; thence west along the center of Twentieth (20th) Street to the center of Spruce Avenue; thence south along the center of Spruce Avenue to the north line, produced east of lot 127 Winchester Place; thence west along the north lines of lots 127 and 138 of Winchester Place, and this line produced west to the center of Jackson Avenue; thence south along the center of Jackson Avenue to the center of
90 the Westport & Independence Road; thence south westwardly along the center of the Westport & Independence Road to the west line of the southeast quarter of the southeast quarter of Section 10, Township 49, Range 33; thence south along said quarter section line to the center of Twenty-seventh (27th) Street; thence west along the center of Twenty-seventh (27th) Street to the center of Indiana Avenue; thence south along the center of Indiana Avenue to a point 404.68 feet south of the center of Twenty-seventh (27th) Street; thence west and parallel to the center of Twenty-seventh (27th) Street to a point 700 feet east of the east line of Benton Boulevard; thence south and parallel to the east line of Benton Boulevard to the center of Thirtieth (30th) Street; thence west to place of beginning.

Section 2.—Said Sewer District being situated in Sewer Division No. 3, as the same was established by resolution of Board of Public Works March 13th, 1891.

Section 3.—All ordinances or parts of Ordinances in conflict with

this ordinance are insofar as they conflict with this ordinance hereby repealed.

Passed Jul- 29, 1901.

JNO. P. O'NEIL,
Pro Tem Speaker Lower House of the Common Council.

Attest:
C. S. CURRY,
City Clerk.

Passed Jul- 29, 1901.

L. E. WYNNE,
Acting President Upper House of the Common Council.

Approved Aug. 2, 1901.

Seal of Kansas City (Seal), Missouri.

J. P. LYNCH,
Acting Mayor.

This certifies that the Sewer District proposed to be established by this Ordinance conforms to the system of sewers adopted by
91 Board of Public Works, and this Ordinance is hereby approved.

BOARD OF PUBLIC WORKS.
6685. WM. WRIGHT.
GEO. KUMPF.

Attest:
HARRY B. WALHER,
Secretary.

Board of Public Works (Seal), Kansas City.

Judge Fyke: I don't know whether or not it makes any difference. I understand that John P. Lynch is to be a witness in this case, and I want to know whether he was acting mayor at the time this ordinance was passed?

Mr. Palmer: He was Acting Mayor, Mr. Fyke, but I don't know that he is going to be a witness.

Witness excused.

C. E. DONNELLY, recalled as a witness, testified further as follows:

Direct examination by Mr. Palmer:

Q. Can you give us the approximate distance north and south, Mr. Donnelly, the extreme length of the sewer district?

A. Its greatest length is approximately a mile and a half, and its greatest width is approximately one mile.

Mr. Palmer: That is all, Mr. Donnelly.

Judge Fyke: That is all.
92 Cross examination waived.
Witness excused.

JOHN E. AHERN, called as a witness on the part of the defendant, Mount Saint Mary's Cemetery Association, having been duly sworn, testified as follows:

Direct examination by Mr. Palmer:

Q. Mr. Ahern, what is your business?
A. I am secretary and superintendent of the Mount Saint Mary's Cemetery Association.
Q. How long have you occupied that position?
A. Since 1904, February, 1904—the second time.
Q. Did you ever occupy that position before?
A. Yes, sir, from '83 to '87.
Q. How long have you lived in Kansas City, Missouri, Mr. Ahern?
A. Thirty-two years.
Q. Were you familiar with that property before you became secretary? That is, did you know it at all?
A. I know it for the last thirty-two years.
Q. Yes. And what has been the use of that property ever since you have been there?
A. For burials, members of the Catholic church.
Q. The property—there were plats filed to that property. We will have them right here in a minute. Has that property been platted, Mr. Ahern?
A. It has been platted.
93 Q. How many plats were there?
A. There are two.
Q. And was one of those plats filed in the office of the Recorder of Deeds?
A. One has been filed.
Q. And has the other been filed, or not?
A. No, sir.
Q. Now, with reference to the plat that has not been filed, where is that plat kept?
A. Well——
Q. (Interrupting.) That is, who keeps that plat?
A. We keep them at the office.
Q. Has the ground been surveyed and worked with reference to these two plats, so as to get the different plats and drives?
A. No, it hasn't. I don't understand what you mean. There is a general map of the entire cemetery.
Q. Yes, sir.
A. And only one portion of it was platted and placed on record, and the other portion was not.
Q. What I want to get at is this, whether the ground out there—whether there are marks or anything of that sort to indicate the dispositions which are shown by the plat?
A. No, sir.

Q. Are the lots marked by any corner marks, or anything of that sort?

A. No, sir.

Q. How do you determine where the location of the ground is with reference to the plat?

A. Well, when it was originally platted, the engineer put down wooden stakes, and from those we determine the lines.

Q. So that——

Judge Fyke (interrupting): Let him testify.

94 (By Mr. Palmer:)

Q. Well, is it true or not, that you can determine from the plat and the ground what particular ground corresponds with the locations upon the plat?

A. Yes, sir.

Q. Now, Mr. Ahern, during all the time that you have been there that has been used for burial purposes, you say? When it is used for burial purposes, how are the graves left, with mounds or not?

A. A slight mound.

Q. Is it possible to see—anyone passing along— the purpose for which the ground is used, by looking at it?

A. Yes, sir.

Q. Are there monuments and stones and marks at different graves in this cemetery?

A. Yes, sir.

Q. Have you any idea how many of those there are?

A. Well, no, I have not.

Q. Have you computed, Mr. Ahern, approximately the amount of ground which had been actually used for burials at the time of the issue of the tax bill in question, in October, 1904?

A. About one-half of it.

Q. And about what is the area of this whole tract—taking out the ground of the House of the Good Shepherd?

A. There are about one million, four hundred thousand square feet, I think.

Q. And in acres, that would be about what?

A. Well, it was supposed at the time of entry to be 40 acres. It was a short forty. I don't think there are more than 34 actual acres—about that.

Q. You mean about 34 actual acres left in the cemetery, after the ground for the House of the Good Shepherd is taken out?

A. Yes, sir.

95 Q. This ground that was sold for burial purposes; In what part of the cemetery is that located?

A. The eastern half.

Q. The eastern half. Now, some of these lots: Were the lots sold there to persons?

A. Yes, sir.

Judge Fyke: We want to object to this testimony, because under the decision of the supreme court it is wholly immaterial and ir-

relevant. That question has been settled by the supreme court. I don't know whether Your Honor has read it, or not.

The Court: Objection sustained.

To which ruling and action of the court the defendant, Mount Saint Mary's Cemetery Association, by its counsel, then and there duly excepted.

Mr. Palmer: What is Your Honor's ruling?

The Court: Sustained.

To which ruling and action of the court the defendant, Mount Saint Mary's Cemetery Association, by its counsel, then and there duly excepted.

Mr. Palmer: I want to state with reference to that, that the question we raise here, as we understand it, has not been passed upon. The question of issuing special tax bills against any separate lot has been passed upon, but the question as to whether you could include in the same tax bill property which the company has no longer any beneficial interest in with the property they have in there and can sell and dispose of—that question has not been passed upon.

The Court: My recollection is, that was passed upon in a case that I tried myself (examining book).

Mr. Palmer: If Your Honor finds it.

96 The Court: I don't have any reference to it here.

Judge Fyke: The supreme court expressly held, that whoever had a lot in there, whether it was by warranty deed or otherwise, and I asked an instruction—that whoever held a lot, that it was proper to issue a tax bill against the whole tract.

The Court: That was held in a case tried in this division.

Judge Fyke: They held that that instruction ought to have been given.

Mr. Palmer: That question was not raised in the upper court, in the supreme court. The question raised there was whether they might have a special tax bill for each lot, and just as in an ordinary tax case, each lot stood by itself. They held that that was not so with the cemetery company. That that was only a qualified interest—only a warranty deed for a special purpose. But they didn't hold—and Mr. Fyke's theory is this—that he can sell only the interest of the defendant in this ground. Now, there is certain property here in which the defendant has no beneficial interest whatever—that interest has gone from it, and the point we make is this: That neither the laws or the constitution will allow the ground which they hold in fee to have its burden increased by the amount which would be assessed against the property which they don't hold in fee. Under the decision of the supreme court, our theory is this: That all the property at the time of the issue of the tax bill which had been sold or occupied for burial purposes, could have been included in one tax bill, and that if we had no right to use it

97 for other purposes, that the tax bill could have been issued there—then the tax bill could have been issued against all of that—but we do say they can't take a tax bill and put it against the seventeen acres of ground in which we have no interest whatever

except to keep it up, and put that upon, continue it on the interest in the seventeen acres of ground which we have under our control, and can sell and get revenues for keeping it up, and this orphan home. We say they can't put a tax bill on the whole thirty-five acres, and lap that over and make a burden on this—and that distinguishes it from the point raised by them in that case.

(After further discussion between court and counsel:)

The Court: Well, that is what the supreme court says should be done.

Mr. Palmer: The point there discussed, was whether every separate lot should be a separate tax bill, but not the ground that they held in fee. That matter wasn't raised in the court, either below or above; and as we say, in the case put to Your Honor, they couldn't hold such sewer with the sewer in the adjoining thirty acres.

The Court: That point was raised in the case I tried, and the court reversed me.

Judge Fyke: (Reading from the opinion of supreme court.)

The Court: I think that is the rule.

To which ruling and action of the court the defendant, Mount Saint Mary's Cemetery Association, by its counsel, then and there duly excepted.

98 Mr. Palmer: In order to get the record, it seems to me it would be better to have this deed in the record, in order that the court can have that before it and not have to send it back for a new trial.

Judge Fyke: I want these deeds in the record, because I want this case settled while I am alive.

Mr. Palmer: I offer in evidence, from page 48 of the Supreme Court Record, to page 52——

(By Mr. Palmer:)

Q. I will first show that to the witness, and ask him if that is a sample form——

Judge Fyke (interrupting): I will admit that is a sample form——

(By Mr. Palmer, continuing:)

Q. Of the deed issued by the company, up to about 1898?

A. Yes, sir.

Mr. Palmer: Then I offer in evidence that deed, together with the acknowledgment and the Record's certificate.

Judge Fyke: You offer the whole of it, don't you—the regulations and stipulations attached?

Mr. Palmer: Yes, sir. I will offer them all, if you don't object.

Judge Fyke: I don't object.

Said portion of said Abstract of Record so offered in evidence, pages 48 to 59 both inclusive, is in the words and figures following, to-wit:

" 'This Deed, Made and entered into this eighth day of November in the year of our Lord one Thousand eight hundred and eighty-

five by and between the Mount St. Mary's Cemetery Association,
under the laws of the State of Missouri, duly organized and
99 incorporated as a body corporate and politic, of the City of
Kansas City and County of Jackson, in said State of Missouri, party of the first part, and Patrick O'Rourke, of the City of Kansas, County of Jackson, Missouri, party of the second part.

Witnesseth. That the said party of the first part*y*, for and in consideration of the sum of $70.00 Seventy Dollars to it in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, does, subject to the regulations and stipulations hereinafter mentioned, grant bargain and sell unto the said party of the second part a certain lot or piece of ground, situated in Mount St. Mary's Cemetery, on the road to Independence, County of Jackson, a plat of which is filed in the office of the Recorder of Deeds, for said County of Jackson, in Section B of said Cemetery, and a plat of sub-division of which said section will also be filed in the office of the Recorder of Deeds as soon as said Section B shall be fully subdivided, the Lot hereby conveyed being numbered 309 East Fraction, Block 12, Section B on the plat of said Section, to be filed as aforesaid; which said Lot contains Three Hundred and Forty square feet.

To have and to hold the same unto the said party of the second part, his heirs and assigns only as a place of burial, subject, however, to the condition, stipulations and regulations hereto annexed and made part of this deed, and which are the conditions upon which this deed is made.

And the said party of the first part covenants for itself, its successors and assigns that it shall and will upon the faithful
100 compliance by said party of the second part, his heirs, executors, administrators and assigns, of the said stipulations and regulations, warrant and defend the title to the premises to him and them, the said party of the second part, his heirs, executors, administrators and assigns, against the lawful claims and demands of all persons whatsoever.

In Witness Whereof, the said party of the first part has caused these presents to be executed under the seal and signature of Thomas Corrigan, its President, hereto affixed, and the same being further attested under the signature of —— —— its Secretary, and attested under the Seal of the corporation, all done the day and year hereinabove written.

(Signed) THOMAS CORRIGAN. [SEAL.]
President.

Attest:
JNO. E. AHERN. [SEAL.]

Regulations and Stipulations of Mount St. Mary's Cemetery.

Forming part of the foregoing deed and the conditions on which it is made.

1. No lot shall be used for other purpose than as a place of burial

for the dead. The grade of all lots shall be determined by the Superintendent of the Cemetery.

2. Owners of lots may enclose the same with a wall or fence, not more than eighteen inches high, exclusive of the railing,
101 which shall be placed within the line of said lot. Wooden enclosures not allowed.

3. Proprietors of lots shall preserve the land marks of the same at their own expense.

4. Proprietors will be entitled to bury all members of their family in the lots owned by them. When such persons shall not be entitled to the rites of Christian burial, according to the discipline of the Roman Catholic Church, a simple interment will be allowed, provided that no religious ceremony take place on the occasion within the precincts of the Cemetery.

5. No funeral, which shall be accompanied by the members of any secret society, wearing their regalia, or carrying banners, will be admitted to the cemetery.

6. No disinterments shall be allowed without the written permit of the President of the Mount St. Mary's Cemetery Association, or other persons acting in his stead.

7. Proprietors shall not allow interments to be made in their lots for a remuneration.

8. Proprietors shall have a right to erect any tombstones, monument or other sepulchral structure on their respective lots, all of which shall be properly set in masonry; and to cultivate trees, shrubs and plants on the same; but no tree growing within the lot or border shall be cut down or destroyed without the consent of the Superintendent of the Cemetery.

9. Should any trees or shrubs, situate in any lot, become, by means of their roots, branches, or otherwise detrimental to the adja-
102 cent lots or avenues, or dangerous or inconvenient to passengers, it shall be lawful for the Superintendent of the Cemetery to enter said lot and remove the said trees or shrubs, or such part thereof as shall be detrimental, dangerous or inconvenient. Should any inscription, effigy, or other structure be deemed unfitting or incompatible with the Catholic character of the Cemetery, it shall be lawful for the Superintendent to prohibit the erection of such monument; or if erected, to remove it, first having the written direction of the President of the Mount — Mary's Cemetery Association, or other person acting for him, so to do.

10. After any interment shall have been made in any lot, such lot shall not be conveyed or sold by the owner, but because his inalienable property, not subject to execution or any process of law, and liable only to be divested by reason of the forfeiture created by the breach of any of the conditions imposed by these rules.

11. All workmen employed in the construction of vaults, enclosures of lots, erection of monuments, etc., are subject to the control and direction of the Superintendent. Any workman failing to comply with this rule, will not be permitted to work on the grounds, and will be refused admission to the Cemetery.

12. Tombs, the entrance of which is not closed up with earth,

must be furnished with shelves, having divisions, allowing interments to be separate made, and closely walled up.

103 STATE OF MISSOURI,
County of Jackson, ss:

On this 17th day of November, eighteen hundred and eighty-five, before me appeared Thomas Corrigan, to me personally known, who being by me duly sworn, did say that he is the President of Mount St. Mary's Cemetery Association, and that the seal affixed to said instrument is the corporate seal of said corporation and that said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors.

And said Thomas Corrigan acknowledges said instrument to be the free act and deed of said corporation.

(My commission expires January 19th, eighteen hundred and—87.)

In witness whereof, I have hereunto set my hand and affixed my notarial seal at office in Kansas City, this 17th day of November, eighteen hundred and eighty-five.

(Signed) JOHN C. TARSNEY,
[SEAL.] *Notary Public, Jackson County, Mo.'*

'STATE OF MISSOURI,
County of Jackson, ss:

In Recorder's Office.

I, O. H. Queal, Recorder of Deeds, within and for the County aforesaid, do hereby certify that the foregoing and annexed instrument of writing was, on the 9th day of December, A. D. 1895 at 2 o'clock — minutes p. m., duly filed for record in this office and with the Certificate of Acknowledgement thereon endorsed is recorded in the records of this office in Book B No. 612, at page 19.

104 In witness whereof, I hereunto set my hand and affix the seal of said office at Kansas City, Mo., the day and year last aforesaid.

(Signed) O. H. QUEAL, *Recorder.*
[SEAL.] By H. M. BASTMAN, *Deputy.*

(Said deed bears the following endorsement):

'M 253533

Mount St. Mary's Cemetery Association.
to
Patrick O'Rourke.

Deed.

Section B, Bl'k 12. Lot 309 E. Fraction.
$70.00.

Mr. Moore: I now offer in evidence deed from Mount St. Mary's Cemetery Association to Thomas Green, dated the 1?th day of

April, 1882, signed by Thomas Corrigan, President, under the seal of the Mount St. Mary's Cemetery Association, conveying Lot No. 368, Block 14, Section 'B' of the plat of the Mount St. Mary's Cemetery Association.

Mr. Fyke: Same objection to this deed.

The Court: Overruled.

To which action and ruling of the court in overruling said objection the plaintiff then and there duly excepted at the time and still excepts.

Mr. Fyke: And the further objection that it has never been filed for record.

The Court: Overruled.

105 To which action and ruling of the court in overruling said objection the plaintiff then and there duly excepted at the time and still excepts.

Which said deed, last above introduced and read in evidence by the said defendant, is marked Exhibit No. 5 and in words and figures following, to-wit:

EXHIBIT No. 5.

'This deed, made and entered into this 12th day of April in the year of our Lord, One Thousand Eight Hundred and Eighty-two by and between Mount Saint Mary's Cemetery Association, under the laws of the State of Missouri, duly organized and incorporated as a body corporate and politic of the City of Kansas and County of Jackson, in said State of Missouri, party of the first, and Thomas Green of the County of Jackson, State of Missouri, party of the second part.

Witnesseth, that the said party of the first part, for and in consideration of the sum of ($40.00) Forty Dollars to it in hand paid by the said party of the Second part the receipt whereof is hereby acknowledged, does, subject to the regulations and stipulation hereinafter mentioned, grant and bargain and sell unto the said party of the second part a certain lot or piece of ground, situate in Mount St. Mary's Cemetery, on the road to Independence, and County of Jackson a plat of which is filed in the office of the Recorder of Deeds for said County of Jackson, the Lot hereby conveyed being

106 numbered 368, Block 14, Section B on the plat of said Section, as aforesaid; which said lot contains Four Hundred square feet.

To have and to hold the same unto the said party of the second part, his heirs and assigns only as a place of burial, subject, however, to the conditions, stipulations and regulations hereto annexed and made a part of this deed, and which are the conditions upon which the deed is made.

And the said party of the first part covenants for itself, its successors and assigns, that it shall and will upon the faithful compliance by said party of the second part, his heirs, executors, administrators and assigns, of the said stipulations and regulations, warrant and

defend the title to the premises to him and them, the said party of the second part, his heirs, executors, administrators and assigns, against the lawful claims and demands of all persons whatsoever.

In witness whereof, the said party of the first part has caused these presents to be executed under the seal and signature of —— ——, its President, hereto affixed, and the same being further attested under the signature of —— —— its Secretary, and attested under the seal of the corporation, all done the day and year herein above written.

(Signed) THOMAS CORRIGAN, [SEAL.]
President.

Attest:
[SEAL.] —— ——.

107 Regulations and Stipulations of the Mount St. Mary's Cemetery.

Forming a Part of the Foregoing Deed and Conditions on Which it is Made.

1. No lot shall be used for any other purpose than as a place of burial for the dead. The grade of all lots shall be determined by the Superintendent of the Cemetery.

2. Owners of lots may enclose the same with a wall or fence, not more than eighteen inches high, exclusive of the railing, which shall be placed within the line of said lot. Wooden enclosures are not allowed.

3. Proprietors of lots shall preserve the landmarks of the same at their own expense.

4. Proprietors will be entitled to bury all members of their family in the lots owned by them. When such persons shall not be entitled to the rights of a Christian burial according to the discipline of the Roman Catholic Church, a simple interment will be allowed, provided that no religious ceremony take place on the occasion within the precincts of the Cemetery.

5. No funeral, which shall be accompanied by the members of any secret society, wearing their regalia, or carrying banners, will be admitted to the Cemetery.

6. No disinterments shall be allowed without the written permit of the President of the Mount St. Mary's Cemetery Association, or other persons acting in his stead.

7. Proprietors shall not allow interments to be made in their lots for a remuneration.

108 8. Proprietors shall have the right to erect any tombstone, monument or other sepulchral structure on their respective lots, all of which shall be properly set in masonry, and to cultivate trees, shrubs and plants on the same, but no tree growing within the lot or border shall be cut down or destroyed without the consent of the Superintendent of the Cemetery.

9. Should any tree or shrubs, situate in any lot, become, by means of their roots, branches or otherwise, detrimental to the adjacent

lots or avenues, or dangerous or inconvenient to passengers, it shall be lawful for the Superintendent of the Cemetery to enter said lot and remove said trees or shrubs, or such parts thereof as shall be detrimental, dangerous or inconvenient. Should any inscription, effigy or other structure be deemed unfitting or incompatible with the Catholic character of the Cemetery, it shall be lawful for the Superintendent to prohibit the erection of such monument, or, if erected, to remove it, first having the written direction of the President of the Mount St. Mary's Cemetery Association, or other person acting for him, so to do.

10. After any interment shall have been made in any lot, such lot shall not be conveyed or sold by the owner, but becomes his inalienable property, not subject to execution or any process of law, and liable only to be divested by reason of the forfeiture created by the breach of any of the conditions imposed by these rules.

11. All workmen employed in the construction of vaults, enclosures of lots, erection of monuments, etc., are subject to the control and direction of the Superintendent. Any workman
109 failing to comply with this rule will not be permitted to work on the grounds, and will be refused admission to the Cemetery.

12. Tombs, the entrance of which is not closed up with earth, must be furnished with shelves, having divisions, allowing interments to be separately made, and closely walled up.

"STATE OF MISSOURI,
County of Jackson, ss:

Be it remembered, that on this, the 12th day of April, in the year of our Lord Eighteen hundred and eighty-two, the undersigned Thomas King, a notary public within and for said Jackson County, came Thomas Corrigan, to me personally known to be the same person whose name, as President of the Mount St. Mary's Cemetery Association, is subscribed to the within and foregoing deed, and he acknowledged the same to be the act and deed of the said Mount St. Mary's Cemetery Association, and his act and deed as President thereof, for the purpose therein specified and mentioned.

My commission expires Feb'y. 23", 1886.

In witness whereof, I have hereunto set my hand and affixed my notarial seal, at office, in the City of Kansas, the day and year last above written.

(Signed) THOMAS KING,
[SEAL.] *Notary Public."*

(Said deed bears the following endorsement):

110 "Mount St. Mary's Cemetery Association
to
Thomas Green.

Deed.

Section B. Block 14. Lot 368.

$40.00.

Mr. Palmer: I think I will also offer in evidence pages 74 and 75, being the form of the instrument given——

(By Mr. Palmer:)

Q. I will ask you whether that is a sample——

Judge Fyke (Interrupting): I will admit that that form was used after 1898.

Mr. Palmer: Upon sales of lots, for purposes for use as a cemetery.

Judge Fyke: That is not a deed. It is a mere certificate of license.

Mr. Palmer: That is the other form they used.

Judge Fyke: Yes, sir; but, it is simply a license to bury. Said portion of said Abstract of Record so offered in evidence, pages 74 and 75, is in the words and figures following to-wit:

"Mount St. Mary's Cemetery Association.
to
—— ——.

This is to certify that —— —— paid to the Mount St.
111 Mary's Cemetery Association the sum of $— on account of —— —— in Section — in Mount St. Mary's Cemetery, situate in the County of Jackson and State of Missouri as said lot is marked and designated on the recorded plat of said Mount St. Mary's Cemetery on file in the Recorder's office within and for said County, and which entitled the said —— —— to the exclusive use of said lot or part of lot for the interment of — family forever, subject, however, to such by-laws, rules and regulations as are now in force or may hereafter be adopted by said association.

In testimony whereof the undersigned President and secretary of the Association have hereunto subscribed their names and affixed the seal of said corporation at the office of said association in Kansas City, Missouri, this ——, 190—.

—— ——, *President.*

[SEAL.] —— ——, *Secretary.*

STATE OF MISSOURI,
County of Jackson, ss:

On this ——, 19—, before me appeared —— ——, to me personally known, who being duly sworn, did say, that he is the presi-

dent of Mount St. Mary's Cemetery Association, and that the seal affixed to said instrument is the corporate seal of said association,
112 and that said instrument was signed and sealed in behalf of said association by authority of its Board of Directors, and said —— —— acknowledges said instrument to be the free act and deed of said association.

Test my hand and official seal.

—— ——, *Notary Public.*"

Term expires ——.

(By Mr. Palmer:)

Q. Do you remember about how many of those were issued, Mr. Ahern (showing witness book)?

A. Of the former deeds?

Q. Yes, sir.

A. Something over eight hundred, I think, of the former.

Q. And of the latter, do you remember about how many were issued?

A. About six hundred I believe, I can't say the exact number.

Q. Some of these were recorded and some were not?

A. Yes, sir.

Q. In the office of the Recorder of Deeds?

A. Yes, sir.

Q. Do you remember about how many burials there have been in that cemetery, Mr. Ahern?

A. Up to the present?

Q. Yes, sir.

A. There is over fifteen thousand.

Q. Do you remember about how many there were in October, 1904?

A. I couldn't say. Well, yes, there were about nine thousand.

Q. About nine thousand?

A. Yes, sir.

Q. Mr. Ahern, I will ask you if upon the plat of the ceme-
113 tery you have indicated approximately the ground which had been sold and was actually used for burial purposes in 1904?

A. Yes, sir.

Q. And in what kind of a pencil did you indicate that?

A. Red.

Q. And on which side of the red line was the property which had been so sold and used?

A. East.

Q. Did you also, on that plat, indicate the property which has been sold since that time?

A. Yes, sir.

Q. And what color pencil did you use for that?

A. Green.

Q. On what side of the green line was the property that had been so sold?

A. On the east.

Q. Between that and the red line?

A. Yes, sir.

Mr. Palmer: You may cross examine him.

Cross-examination by Judge Fyke:

Q. You say you are secretary and superintendent of the Cemetery Association?
A. Yes, sir.
Q. You have the charge of the entire ground for the Association?
A. Yes, sir.
Q. Now, the south boundary, the street on the south of the cemetery, is 23rd street?
A. Yes, sir.
Q. What kind of a fence encloses the cemetery grounds on that side?
A. A concrete wall.
Q. That is, from one corner to the other, barring an opening for the driveway?
A. Yes, sir.
Q. There is only one opening on that side, I believe?
A. Yes, sir.
Q. Now, the west boundary line is Cleveland avenue, isn't it?
A. And its fence.
114 Q. That extends from one corner of the ground to the other?
A. Yes, sir.
Q. There is no opening there at all?
A. No, sir.
Q. What is up on the north side of the cemetery grounds?
A. A wire fence.
Q. And there is no opening there?
A. No, sir.
Q. What is on the east side of the cemetery grounds?
A. A concrete wall.
Q. That extends clear along the east side—the whole line of the cemetery?
A. Yes, sir.
Q. And there is one opening there, for foot passage?
A. Yes, sir.
Q. This whole cemetery ground is under your control and supervision as secretary of this Cemetery Association?
A. Yes, sir.
Q. You say you sell lots there?
A. Yes, sir.
Q. Do you know how many lots you have sold since this tax bill was issued?
A. No, sir, I couldn't tell you.
Q. Can you approximate it?
A. No, sir.
Q. Have you any way of telling?
A. Not unless I would go over the records.
Q. You haven't done that?
A. No, sir.

Q. Can you approximate the amount of money you have received for lots since this tax bill was issued?
A. Since when?
Q. Since October 12th, 1904?
A. No, sir.
Q. Couldn't you approximate it?
A. Probably $70,000.
Q. $70,000?
A. Yes, sir.
115 Q. That you have received since October, 1904?
A. Yes, sir. I wouldn't say that is the exact amount, but approximately.
Q. Certainly. I believe you said how many square feet of ground there is in that cemetery, all told?
A. One million four hundred thousand square feet.
Q. Well, there is 44,000 square feet in an acre—a little over that?
A. Yes, sir.
Q. (Figuring.) And I make it——
A. (Interrupting.) The driveways and walks come out of that.
Q. Well, I am including the driveways and walks.
A. I am not.
Q. But you included them in your other estimate?
A. Yes, sir.
Q. But you include all of the other ground?
A. Yes, sir.
Q. Pardon me. What did you say it is, excluding the driveways and walks? How many square feet of ground did you say?
A. I couldn't say.
Q. Didn't you say a moment ago there was over a million?
A. No, I said the area of the cemetery is one million four hundred thousand square feet—I thought.
Q. One million, four hundred thousand?
A. Yes.
Q. That includes everything?
A. Yes, sir.
Q. What price do you sell this ground for—when you sell it by the square foot?

Mr. Palmer: I don't know that that is very material.
The Court: Let him answer.
To which ruling and action of the court the defendant
116 Mount Saint Mary's Cemetery Association, by its counsel, then and there duly excepted.

A. The lots range from fifty-five to seventy cents per square foot.

(By Judge Fyke:)

Q. Per square foot?
A. Yes, sir.
Q. How many square feet of ground was undisposed of by these

first deeds or licenses, at the time this first tax bill was issued in October, 1904?

A. Practically a half of it.

Q. That would be about 750,000 square feet?

A. Well——

Q. (Figuring.) Not about 750,000—about 700,000 square feet. At the time this first tax bill was issued, there was that much unsold?

A. But the cemetery is not composed of lots entirely.

Q. I understand that. But what you sold, you sold by the square foot? That is the way you sold it?

A. No, a single grave.

Q. A single grave you would sell for what?

A. Six, ten or fifteen dollars.

Q. What do you mean by that?

A. The price of the grave, including digging and sodding.

Q. Didn't you testify when you testified before, that it was ten and fifteen dollars?

A. I spoke of adults.

Q. "Adults." Wasn't this question asked you: "Q. (By Mr. Moore:) State, if you know, what is the average price at which land is sold per foot in Mount St. Mary's Cemetery?" and didn't you say: "A. It is a hard question to answer. Most of our burials are single graves and very few lots. Lots don't compare with
117 single graves. A lot would sell for about an average of sixty cents a square foot"?

A. Yes, sir.

Q. You testified to that?

A. Yes, sir.

Q. And wasn't this question asked you, and didn't you make this answer: "Q. (The Court:) And the single graves sell for what? A. Ten dollars and fifteen dollars." Didn't you testify to that?

A. Those are adult graves. The child graves are six dollars.

Q. How many square feet are there in a child's grave, ordinarily?

A. Well, they average five feet in length and about twenty-eight inches in width. About five by——

Q. (Interrupting.) Five by two and a third feet—twelve square feet. You sell them for five dollars?

A. Including the digging and sodding.

Mr. Palmer: Six dollars, he said.

(By Judge Fyke:)

Q. Mr. Ahern, is there any closet on that cemetery ground, anywhere?

A. Yes, sir.

Q. Where is it located?

A. It is about the central part, towards the south.

Q. The center, towards the south?

A. Yes, sir.

Q. Is there a closet over near the northwest corner of the cemetery?

A. Yes, there is one there.
Q. Then you have two closets on the cemetery grounds?
A. Yes, sir.
Q. Is there more than two?
A. No, sir.
Q. This closet over in the northwest corner, what outlet has that?
A. It hasn't any.
118 Q. Did it ever have any outlet?
A. No, sir.
Q. Never did?
A. No, sir.
Q. What is the surface of the ground there at the northwest corner of the cemetery?
A. It is low.
Q. It is kind of a plane down there?
A. Yes, sir.
Q. What becomes of the surface water down there?
A. It goes over the wall.
Q. Has there ever been any connection in any way between the cemetery ground to the manhole in this sewer on Cleveland Avenue, so as to take care of that surface water?
A. Yes, sir.
Q. There has?
A. Yes, sir.
Q. Explain to the court how that connection was made?
A. The connection was left out in the street before ever the street was graded, and when Mr. West graded the street, he placed out there about a hundred feet of ten-inch sewer pipe; and, he claimed his reasons were, that the Board of Health forbid the damming of the water there.
Q. Then, this surface water that runs off of this cemetery ground runs through this ten-inch pipe where?
A. I don't know where.
Q. Don't you know that it runs into the manhole in that sewer?
A. That pipe is closed up. The larger portion of that runs over the wall there.
Q. Mr. Ahern, is it a ten-inch pipe there?
A. I don't know.
Q. Mr. Ahern, was there a brick box built on the cemetery ground there, about four feet square?
A. Yes, sir.
119 Q. Who built that?
A. I did.
Q. What did you do that for?
A. To separate—we couldn't close it up entirely.
Q. Don't you know that this ten inch pipe which runs from that box at this time, connects to this manhole of the sewer?
A. We didn't put that pipe there.
Q. Well, you know that that takes care of this water?
A. Yes, sir.
Q. And that takes care of that surface water there?

A. Yes, sir.
Q. Now, isn't it a fact it is connected with that closet?
A. No, sir.
Q. The water closet over there in the northwest corner, has a pipe running to the box?
A. No, sir.
Q. And wasn't it at one time connected?
A. No, sir.
Q. And don't you know that the water washed out two joints of this sewer pipe?
A. I do.
Q. When was that, Mr. Ahern?
A. That is the surface pipe that connects with the main drive, about eighteen inches deep. That has no connection with that closet, because that is one of the vaults.
Q. How long is that pipe draining the drive there?
A. I don't know. It was originally put there before I went there.
Q. It connects with this box, doesn't it?
A. No, sir.
Q. Where does the water come from that comes through that pipe?
A. From that driveway.
Q. Don't it run into that box?
A. I suppose so.
120 Q. You know it, Mr. Ahern, don't you?
A. The general flow of the whole cemetery runs that way.
Q. Runs into that box?
A. Yes, sir.
Q. And runs out of that box through this ten-inch pipe into the manhole of this sewer?
A. Yes, sir.

Judge Fyke: That is all.

Redirect examination by Mr. Palmer:

Q. Now, Mr. Ahern, the discharge of one ten-inch pipe of surface water——
A. (Interrupting.) Yes, sir.
Q. That is all you have got in this sewer?
A. Yes, sir.
Q. And that is what you have got for twenty-eight or twenty-nine thousand dollars' worth of special tax bills?
A. Yes, sir.

Judge Fyke: Yes, and they haven't paid them.

(By Mr. Palmer:)

Q. Now, Mr. Ahern, Mr. Fyke has spoken about seven hundred and fifty thousand square feet of ground sold at the time this tax bill was issued: I will ask you if it could be sold unless you provided for drives and paths?
A. No, sir.

Q. And I will ask you what amount of that is really available, if you have computed it, for sale?

A. About five hundred thousand square feet.

Q. Five hundred and nine thousand, four hundred square feet, is about what you computed that?

A. Yes, sir.

121 Q. I will ask you, if it costs anything to run a cemetery, Mr. Ahern?

A. Well, yes.

Q. You have the expense of keeping up the cemetery, haven't you?

A. Yes, sir.

Q. And the lots?

A. Yes, sir.

Q. And the appearance of the cemetery?

A. Yes, sir.

Q. And you have to dig the graves, I suppose?

A. Yes, sir.

Q. And you have all those matters of expense?

A. Yes, sir.

Q. And the articles of incorporation show——

Judge Fyke (Interrupting.) They show what they show.

Mr. Palmer: Yes, they show what they show.

(By Mr. Palmer:)

Q. The articles of incorporation provide that the proceeds, after maintenance of the cemetery, shall be paid over to certain charities What charities are those, Mr. Ahern?

Judge Fyke: The articles of incorporation would be the best evidence.

A. St. Anthony's Home, St. Joseph's Children's Home, and the Perry Memorial Home.

Mr. Palmer: I don't think the articles of incorporation provide what particular ones, Judge Fyke.

Recross-examination by Judge Fyke:

Q. Mr. Ahern, has this Mount Saint Mary's Cemetery Association any money loaned out now at interest, that has been derived from the sale of these lots in the cemetery?

122 A. They have their maintenance from it.

Q. Have they any money loaned out at interest?

A. I said they have their maintenance.

Q. How much is it??

Mr. Palmer: I object to that as improper, and unfair.

The Court: Let him answer.

To which ruling and action of the court the defendant, Mount Saint Mary's Cemetery Association, by its counsel then and there duly excepted.

A. The Maintenance Fund.

(By Judge Fyke:)

Q. I want to know how much?
A. I don't know.
Q. I want to know, if you know approximately?
A. I can't say approximately. There is twenty-eight and some odd thousand dollars of maintenance.
Q. Did you testify, when your deposition was taken, that they had one hundred thousand dollars loaned out at interest?
A. No, sir.
Q. You never did?
A. No, sir.

Mr. Palmer: I just want to ask one question.
Judge Fyke: I am not through yet.

(By Judge Fyke:)

Q. I don't believe I understand fully about that other drain pipe there. I don't know whether you answered my question or not. You said there was a drain pipe that came down from some driveway through the north part of the cemetery?
A. There was a drain pipe through the cemetery, going down through those gulleys, before ever the cemetery was built,
123 keeping in a central location, and down into Cleveland Avenue.
Q. And then down Cleveland Avenue?
A. Yes, sir.
Q. And since that street was graded there is no way for that water to go, except through this manhole of the sewer?
A. What can get through there.
Q. And if it wasn't for this ten-inch pipe there would be a lake there right east of Cleveland Avenue?
A. To some extent. It is nearly filled up now.
Q. Now, how long is that pipe that runs down there, that you have spoken of?
A. I don't understand what you mean.
Q. Well, to the east, from this brick box, northeast?
A. We don't now connect with the box.
Q. Well, to the west of the box, then. The water gets into the box. But from the end nearest the box, how long is that pipe?
A. Probably four hundred feet long.
Q. What is the size of it?
A. It is an eight-inch pipe.
Q. It is buried under the ground, is it?
A. Yes, sir.
Q. How does the water get into it?
A. From the catch basin.
Q. Through the catch basins along that pipe, all the surface water gets in and runs off?
A. Yes, sir.

Q. Now, in the southwest corner of this cemetery, bounded on the west by Cleveland and on the south by Twenty-third street, there is a large tract of this ground there that has nobody buried
124 in it at all, isn't there?

A. Southwest?

Q. Yes.

A. Yes, there is some ground there.

Q. About ten acres?

A. No, sir.

Q. How much is there?

A. At present, I don't think there is more than five or six acres.

Q. There was about ten acres at the time this tax bill was issued?

A. There have been burials there since.

Q. When did you first begin to bury there, Mr. Ahern?

A. We have continued to bury there right along.

Q. Didn't you first begin to bury there about the time this suit was brought?

A. In the southwest corner?

Q. Yes, where that ten acre tract is?

A. Yes, sir.

Q. And wasn't the first burial there, a foundling carried out of your church and buried there without a permit about the time this suit was brought?

A. No, sir, there have been none buried there without a permit.

Q. Well, you buried it there without an undertaker?

A. No, sir.

Q. Well, who was the undertaker?

A. I couldn't state now.

Redirect examination by Mr. Palmer:

Q. Mr. Ahern, you spoke about a Maintenance Fund. What is this Maintenance Fund intended for?
125 —. For the future care of the cemetery after it ceases to bear revenue.

Q. Is there any other provision for the care of the cemetery after the revenues cease?

A. None whatever.

Q. And by "ceasing to bear revenue," you mean when the lots are all sold out and the ground is all sold?

A. Yes, sir.

Mr. Palmer: That is all, for the present.

Witness excused.

Mr. Palmer: Your Honor, we would like to introduce in evidence from pages 75 to 96, inclusive, of the record in the supreme court. That shows the record of a lot of certificates of deeds.

Judge Fyke: In order to make my record, I want to object to the introduction of these deeds, not on account of the fact that they are not identified in the record, but because under the decision of the

supreme court, they don't affect the right of the plaintiff to recover; and I object to them as incompetent, irrelevant and immaterial.

The Court: Objection sustained.

To which ruling and action of the court the defendant, Mount Saint Mary's Cemetery Association, by its counsel then and there duly excepted.

Said portion of said record so offered in evidence, and excluded by the court is in the words and figures following, to-wit:

125½ "Mr. McCune: We would like to introduce the record here, showing the recording of some of these deeds on the warranty deed form; also some of the deeds on the license form, and show that they are a matter of record in the recorder's office. We can show that from the abstract.

Mr. Fyke: I don't want to encumber the record with the deeds themselves. I will probably object to what they offer.

The Court: I understand you object to any of these offers for the reason set out in your first objection, but you have no objection to the form in which they offer them?

Mr. Fyke: No, sir.

The Court: But object to the offer for the reasons given?

Mr. Fyke: Yes, sir. The certificate of the abstracter as to the cemetery deed is objected to because incompetent, irrelevant and immaterial. Not because the deeds are not all set out in full, but on the general g-ound does not tend to prove or disprove any issue in the case.

Mr. McCune: Not on the ground that the certificate is not the best evidence?

Mr. Fyke: No, sir, not on that ground.

The Court: Objection overruled.

To which action and ruling of the court in overruling said objection the plaintiff then and there duly excepted at the time and still excepts.

126 Which said records of deeds, last above introduced and read in evidence by the said defendant, are in words and figures following, to-wit:

Book B 612.
Page 19.
No. 253533.
(Compared.)

Cemetery Deed.
Dated Nov. 8, 1885.
Filed, Dec. 9, 1895.
Cons. $70.

Mount Saint Mary's Cemetery Association, a Missouri Corporation,
to
Patrick O'Rourke.

This deed made and entered into this November 8, in the Year of Our Lord one thousand eight hundred and eighty-five, by and between the Mt. St. Mary's Cemetery Association, under the laws of the State of Missouri, duly organized and incorporated as a body corporate and politic of the City of Kansas and County of Jackson in said State of Missouri, party of the first part, and Patrick O'Rourke, of the City of Kansas, County of Jackson, Missouri, party

of the second part, witnesseth: That the said party of the first part for and in consideration of the sum of $70. Seventy Dollars, to it in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, and subject to regulations and stipulations hereinafter mentioned, grant, bargain and sell unto said party of the second part a certain lot or piece of ground situated in Mount Saint Mary's Cemetery on the road to Independence, and the County of Jackson, a plat which is filed in the office of the Recorder of Deeds of said County of Jackson, section B of said
127 cemetrey, and a plat of subdivision of which said section will also be filed in the office of the recorder of Deeds as soon as said section B shall be fully subdivided, the lot hereby conveyed being numbered 309, East fraction, Block 12, Section B on the plat of said section to be filed as aforesaid; which said lot contains 340 square feet.

To Have and to Hold the same unto the said party of the second part, his heirs, assigns only as a place of burial; subject however, to the conditions stipulations and regulations hereto annexed and made a part of this deed, and which are the conditions upon which this deed is made. And the said party of the first ..... covenants for itself, its successors and assigns that it shall and will upon the faithful compliance by said party of the second part, his heirs, executors, administrators and assigns, of the said stipulations and regulations, warrant and defend the title to the premises to him and them, the said party of the second part, his heirs, executors, administrators and assigns against the lawful claims and demands of all persons whatsoever.

In witness whereof the said party of the first part has caused these presents to be executed under the seal and signature of Thomas Corrigan, its President, hereto affixed, and the same being further attested under the signature of —— ——, its Secretary, and attested under the seal of the corporation, all done the day and year hereinabove written.

THOMAS CORRIGAN, [SEAL.] [L. S.]
President.

Attest:
JNO. E. AHERN.

128 Regulations and stipulations of the Mount St. Mary's Cemetrey. Forming part of the foregoing deed and conditions on which it is made.

1. No lot shall be used for any other purpose than as a place of burial for the dead. The grade of all lots shall be determined by the Superintendent of the Cemetery.

2. Owners of lots may enclose the same with a wall or fence not more than eighteen inches high, exclusive of the railing which shall be placed within the line of said lot. Wooden enclosures are not allowed.

3. Proprietors of lots shall preserve the landmarks of the same at their own expense.

4. Proprietors will be entitled to bury all members of their family in the lots owned by them. When such persons shall not be entitled to the rites of the Christian burial according to the discipline of the Roman Catholic Church, a simple interment will be allowed provided that no religious ceremony takes place on the occasion within the precincts of the cemetery.

5. No funeral which shall be accompanied by the members of any secret society wearing their regalia or carrying banners will be admitted to the cemetery.

6. No disinterment shall be allowed without the written permit of the President of the Mount St. Mary's Cemetery Association or other persons acting in his stead.

7. Proprietors shall not allow interments to be made in their lots for a remuneration.

8. Proprietors shall have a right to erect any tombstone, monument or other sepulchral structure on their respective lots,
129 all of which shall be properly set in masonry; and to cultivate trees, shrubs and plants on the same; but no trees growing within the lots or border shall be cut down or destroyed without the consent of the Superintendent of the Cemetery.

9. Should any trees or shrubs situate in any lot become by means of their roots, branches or otherwise detrimental to the adjacent lots or avenues or dangerous or inconvenient to passengers, it shall be lawful for the Superintendent of the Cemetery to enter said lot and remove the said trees or shrubs or such part thereof as shall be detrimental, dangerous or inconvenient. Should any inscription, effigy, or other structure be deemed unfitting or incompatible with the Catholic character of the cemetery, it shall be lawful for the superintendent to prohibit the erection of such monument; or if erected, to remove it, first having the written direction of the President of the Mount St. Mary's Cemetery Association, or other person acting for him so to do.

10. After any interment shall have been made in any lots, such lot shall not be conveyed or sold by the owner, but becomes his inalienable property, not subject to execution or any process of law, and liable only to be divested by reason of the forfeiture created by the breach of any of the conditions imposed by these rules.

11. All workmen employed in the construction of vaults, enclosures of lots, erection of monuments, etc., are subject to the control and direction of the Superintendent. Any workman failing to comply with this rule will be refused admission to the cemetery.

12. Tombs, the entrance of which is not closed up with
130 earth, must be furnished with shelves having divisions allowing interments to be separately made and closely walled up.

STATE OF MISSOURI,
County of Jackson, ss:

On this 17th day of Nov., eighteen hundred and eighty-five, before me appeared Thomas Corrigan to me personally known, who being by me duly sworn did say that he is the president of Mount St.

Mary's Cemetery Association, and that the seal affixed to said instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by the authority of its Board of Directors. And said Thomas Corrigan acknowledges said instrument to be the free act and deed of said corporation.

(My commission expires January 19th, eighteen hundred and 87.)

In witness whereof I have hereunto set my hand and affixed my notarial seal at office in Kansas City, this 17th day of November, eighteen hundred and eighty-five.

[L. S.]

JOHN C. TARSNEY,
Notary Public, Jackson County, Mo.

Book B 643. Cemetery Deed.
Page 346. Dated Apr. 12, 1882.
No. 289968. Filed Nov. 4, 1897.
(Compared.) Cons. $120.

Mount St. Mary's Cemetery Association, a Missouri Corporation,
to
Thomas Corrigan and Bernard Corrigan.

131 Conveys: Lots 301, 302, 303, 304, in Block 11, Section B, Mount St. Mary's Cemetery which said lots contain 1200 square feet.

This deed has no schedule of restrictions or conditions recorded with it.

Book B 612. Cemetery Deed.
Page 216. Dated July 27, 1895.
No. 256465. Filed Feb. 5, 1896.
(Compared.) Cons. $30.

Mount St. Mary's Cemetery Association, a Missouri Corporation,
to
Mrs. M. B. Miller.

Conveys: Lot 13, South ½, Block 1, Section A, Mount St. Mary's Cemetery, which said lot containing 10 by 10 or 100 square feet.

Book B 568. Cemetery Deed.
Page 490. Dated Dec. 3, 1887.
No. 234665. Filed Nov. 26, 1894.
(Compared.) Cons. $60.

Mount St. Mary's Cemetery Association, a Missouri Corporation,
to
John Connell.

Conveys: Lot 72, Block 3, in Section B, in Mount St. Mary's Cemetery, which said lot contains 10 by 20 or 200 square feet.

132 Book B 563.
Page 236.
No. 229314.
(Compared.)

Cemetery Deed.
Dated Feb. 27, 1878.
Filed July 5, 1894.
Cons. $120.

Mount St. Mary's Cemetery Association, a Missouri Corporation,
to
Peter Sodon and Patrick Sodon.

Conveys: Lots 261, 262, 273 and 274, Block 10, Section B, in Mount Saint Mary's Cemetery, which said lots contain 1200 square feet.

Book B 563.
Page 176.
No. 228746.
(Compared.)

Cemetery Deed.
Dated Sept. 6, 1881.
Filed June 19, 1894.
Cons. $40.

Mount St. Mary's Cemetery Association, a Missouri Corporation,
to
John Hughes.

Conveys: North half Lot 264, Block 10 in Section B, in Mount Saint Mary's Cemetery, which said lot contains 200 square feet.

133 Book B 562.
Page 212.
No. 227558.
(Compared.)

Cemetery Deed.
Dated Sept. 12, 1892.
Filed May 21, 1894.
Cons. $60.

Mount St. Mary's Cemetery Association, a Missouri Corporation,
to
John Stretch (Estate).

Conveys: Lot 34, North half, in Block 2, Section A, in Mount St. Mary's Cemetery, which said lot contains 10 by 20 or 200 square feet.

Book B 559.
Page 75.
No. 222175.
(Compared.)

Cemetery Deed.
Dated Feb. 24, 1893.
Filed Feb. 9, 1894.
Cons. $60.

Mount St. Mary's Cemetery Association, a Missouri Corporation,
to
Patrick J. McEvoy.

Conveys: Lot 83, South half, Block 4, in Section A in Mount St. Mary's Cemetery, which said lot contains 10 by 20 or 200 square feet.

134 Book B 544. Cemetery Deed.
Page 358. Dated Jan. 22, 1878.
No. 217340. Filed Nov. 9, 1893.
(Compared.) Cons. $20.

Mount St. Mary's Cemetery Association, a Missouri Corporation,

to

Henry Nevins.

Conveys: Lot 365, Block 14, Section "B", in Mount St. Mary's Cemetery, which said lot contains 200 square feet.

Book B 531. Cemetery Deed.
Page 506. Dated Sept. 20, 1884.
No. 213039. Filed July 11, 1893.
(Compared.) Cons. $40.

Mount St. Mary's Cemetery Association, a Missouri Corporation,

to

John Hughes.

Conveys: Lot 61, South half, in Block 3 Section A in Mount St. Mary's Cemetery which said lot contains 200 or 10 by 20 square feet.

135 Book B 530. Cemetery Deed.
Page 439. Dated June 16, 1884.
No. 212681. Filed June 30, 1893.

Mount St. Mary's Cemetery Association, a Missouri Corporation,

to

Andrew Scanlon.

Conveys: Lot 170, South half, in Block 1, Section H, in Mount St. Mary's Cemetery, which said lot contains 200 or 10 by 20 square feet.

Book B 534. Cemetery Deed.
Page 283. Dated Dec. 14, 1878.
No. 212327. Filed June 23, 1893.
(Compared.) Cons. $20.

Mount St. Mary's Cemetery Association, a Missouri Corporation,

to

Mary Moran.

Conveys: Lot 243, Block 10, Section B, in Mount St. Mary's Cemetery, which said lot contains 200 square feet.

136 Book B 641.
Page 290.
No. 289839.
(Compared.)

Cemetery Deed.
Dated Apr. 12, 1882.
Filed Nov. 4, 1897.
Cons. $60.

Mount St. Mary's Cemetery Association, a Missouri Corporation,
to
Thomas Corrigan and Bernard Corrigan.

Conveys: Lot 289, Block 11, Section B, also 290, B. 11, Sec. B, Mount St. Mary's Cemetery which said lots contain 600 square feet. This deed has no schedule of restrictions and conditions recorded with it.

Book B 529.
Page 393.
No. 208957.
(Compared.)

Cemetery Deed.
Dated Apr. 23, 1888.
Filed Apr. 20, 1893.
Cons. $120.

Mount St. Mary's Cemetery Association, a Missouri Corporation,
to
Michael J. Noonan (Estate).

Conveys: Lot 20 in Block 1 in Section P in Mount St. Mary's Cemetery, which said lot contains 400 or 20 by 20 square feet.

137 Book B 529.
Page 128.
No. 206782.
(Compared.)

Cemetery Deed.
Dated Mar. 8, 1886.
Filed Mar. 21, 1893.
Cons. $60.

Mount St. Mary's Cemetery Association, a Missouri Corporation,
to
Mrs. Elizabeth Shea.

Conveys: Lot 83, South half, Block 3 in Section B Mount St. Mary's Cemetery, which said lot contains 200, 10 x 20, square feet.

Book B 529.
Page 27.
No. 206213.
(Compared.)

Cemetery Deed.
Dated Nov. 1, 1891.
Filed Mar. 8, 1893.
Cons. $1.

Mount St. Mary's Cemetery Association, a Missouri Corporation,
to
Mary Carroll.

Conveys: Lot 289, Block 11, in Section B in Mount St. Mary's Cemetery, which said lot contains 20 by 20 or 400 square feet.

138 Book B 522. Cemetery Deed.
Page 457. Dated Nov. 26, 1891.
No. 207043. Filed Mar. 24, 1893.
(Compared.) Cons. $60.

Mount St. Mary's Cemetery Association, a Missouri Corporation,
to
Timothy W. McCarty.

Conveys: Lot 88, Block 4 in Section A in Mount St. Mary's Cemetery, which said lot contains (10 by 20) 200 square feet.

Book B 522. Cemetery Deed.
Page 281. Dated Aug. 16, 1892.
No. 205210. Filed Feb. 18, 1893.
(Compared.) Cons. $60.

Mount St. Mary's Cemetery Association, a Missouri Corporation,
to
James McMenanin.

Conveys: Lot 75, North half, Block 3, Section A, in Mount St. Mary's Cemetery, which said lot contains 10 by 20 feet or 200 square feet.

139 No. 27217.

Norman and Robertson Abstract Company hereby certifies that the instrument shown on pages 1 to 4 of this abstract is a true and correct copy of the instrument recorded in Book B 612 at Page 19 in the office of the Recorder of Deeds in and for Jackson County, Missouri, at Kansas City, and that the other instruments shown in this abstract are identical in form with the instrument shown on said pages 1 to 4 as aforesaid, except where otherwise noted, and we certify to the correctness of this abstract and certificate.

Witness the name of the said company and the corporate seal thereof this June 23, 1913, at 8:00 a. m.

[SEAL.] NORMAN AND ROBERTSON ABSTRACT COMPANY,
By H. R. McCLANAHAN, *Secretary.*"

Book B 789. Cemetery Deed.
Page 626. Dated Nov. 5, 1901.
No. 401342. Filed Jan. 10, 1902.
(Compared.) Cons. $—.

Mount St. Mary's Cemetery Association
to
John Raferty.

This is to certify that John Raferty paid to the Mount St. Mary's Cemetery Association the sum of $— on account of W. half N. half,

10 by 10, Lot 18, in Block 5 in Section P in Mount St. Mary's
140 Cemetery, situate in the County of Jackson and State of Missouri as said lot is marked and designated on the recorded plat of said Mount St. Mary's Cemetery, filed in the Recorder's Office within and for said County, and which entitles the said John Raferty to the exclusive use of said lot or part of lot for the interment of members of his family forever, subject, however, to such by-laws, rules and regulations as are now in force or may hereafter be adopted by said association.

In testimony whereof the undersigned President and Secretary of said association have hereunto subscribed their names and affixed the seal of said corporation at the office of said association in Kansas City, Missouri, this November 5, 1901.

[L. S.] BERNARD CORRIGAN, *President.*
C. M. CONLON, *Secretary.*

STATE OF MISSOURI,
County of Jackson, ss:

On this November 30, 1901, before me appeared Bernard Corrigan, to me personally known, who being by me duly sworn, did say that he is President of Mount St. Mary's Cemetery Association, and that the seal affixed to said instrument was signed and sealed in behalf of said Association by authority of its Board of Directors, and said Bernard Corrigan acknowledged said instrument to be the free act and deed of said Association.

Test my hand and official seal.

[L. S.] WILLIAM MOORE,
Notary Public.

Term expires November 14, 1904.

141 Book B 820. Cemetery Deed.
Page 206. Dated Jan. 24, 1902.
No. 414286. Filed May 24, 1902.
(Compared.) Cons. $180.

Mount St. Mary's Cemetery Association
to
Mrs. Patrick Canty.

Conveys: Twenty by twenty, Lot 154, in Block —, in Section C, in Mount St. Mary's Cemetery, situate in the County of Jackson and State of Missouri.

Book B 805. Cemetery Deed.
Page 620. Dated Nov. 10, 1898.
No. 420410. Filed Aug. 5, 1902.
(Compared.) Cons. $60.

Mount St. Mary's Cemetery Association
to
Mrs. Mary J. Mansfield.

Conveys: East half, 10 by 10, Lot 116, in Block 5, in Section A in Mount St. Mary's Cemetery, situate in the County of Jackson and State of Missouri.

142 Book B 826. Cemetery Deed.
Page 315. Dated Nov. 8, 1901.
No. 427553. Filed Oct. 27, 1902.
(Compared.) Cons. $180.

Mount St. Mary's Cemetery Association
to
Patrick O'Donnell.

Conveys: West two-thirds Lot 79, in Block —, in Section C in Mount St. Mary's Cemetery, situate in the County of Jackson and State of Missouri.

Book B 841. Cemetery Deed.
Page 127. Dated Sept. 20, 1902.
No. 429568. Filed Nov. 19, 1902.
(Compared.) Cons. $60.

Mount St. Mary's Cemetery Association
to
Edd. Welch.

Conveys: East two-thirds, W. half, Lot 63, in Block —, in Section B in Mount St. Mary's Cemetery, situated in the County of Jackson and State of Missouri.

143 Book B 842. Cemetery Deed.
Page 561. Dated Nov. 4, 1902.
No. 436827. Filed Jan. 29, 1903.
(Compared.) Cons. $1193.85.

Mount St. Mary's Cemetery Association
to
Wm. Kenefick.

Conveys: Lots 1, 2, 3, 5, 6, S. half 4, E. half 7, and S. half E. half 9 in Block — in Section C in Mount St. Mary's Cemetery situate in the County of Jackson and State of Missouri.

Book B 844. Cemetery Deed.
Page 349. Dated Aug. 11, 1887.
No. 440289. Filed Mar. 9, 1903.
(Compared.) Cons. $51.

Mount St. Mary's Cemetery Association
to
Sarah Simms.

Conveys: West half Lot 46, in Block 2, in Section A, 170 sq. feet, in Mount St. Mary's Cemetery, situate in the County of Jackson and State of Missouri.

144 Book B 844. Page 385. No. 441821. (Compared.)

Cemetery Deed. Dated Mar. 3, 1903. Filed Mar. 24, 1903. Cons. $60.

Mount St. Mary's Cemetery Association
to
Bartholomew Harrigan.

Conveys: S. half Lot 138, in Block —, in Section C in Mount St. Mary's Cemetery, situate in the County of Jackson and State of Missouri.

Book B 836. Page 374. No. 444102. (Compared.)

Cemetery Deed. Dated Dec. 24, 1902. Filed Apr. 8, 1903. Cons. $90.

Mount St. Mary's Cemetery Association
to
Martin Lynch.

Conveys: S. half Lot 61, in Block —, in Section C in Mount St. Mary's Cemetery, situate in the County of Jackson and State of Missouri.

145 Book B 649. Page 217. No. 287326. (Compared.)

Cemetery Deed. Dated August 4, 1897. Filed Sept. 21, 1897. Cons. $60.

Mount St. Mary's Cemetery Association
to
Christopher C. Handibode.

Conveys: N. half Lot 22, in Block 5, in Section P, 10 by 20, in Mount St. Mary's Cemetery, situate in the County of Jackson and State of Missouri.

Book B 860. Page 173. No. 445536. (Compared.)

Cemetery Deed. Dated Aug. 1, 1900. Filed Apr. 22, 1903. Cons. $60.

Mount St. Mary's Cemetery Association
to
Mr. Daniel Sullivan.

Conveys: East third, Lot 126, in Block —, in Section B in Mount St. Mary's Cemetery, situate in the County of Jackson and State of Missouri.

146 No. 27251.

Norman & Robertson Abstract Company hereby certifies that the instrument shown on the first page of this abstract is a true and correct copy of the instrument recorded in Book B. 789 at Page 626, in the office of the Recorder of Deeds in and for Jackson County, Missouri, at Kansas City, and that the other instruments shown in this abstract are identical in form with the instruments shown on said first page as aforesaid, except where otherwise noted, and we certify to the correctness of the abstract and certificate.

Witness the name of said the Company and the corporate seal thereof this June 23, 1913, at 8:00 a. m.

NORMAN AND ROBERTSON ABSTRACT COMPANY,

[SEAL.] By H. R. McCLANAHAN, *Secretary.*"

JOHN A. MOORE, called as a witness on the part of the defendant, Mount Saint Mary's Cemetery Association, having been duly sworn, testified as follows:

Direct examination by Mr. Palmer:

Q. What is your business, Mr. Moore?

A. Real estate.

Q. You have been engaged in that business for a good while here in Kansas City, haven't you?

A. Yes, a good while—about thirty years.

Q. And you are somewhat familiar with real estate values?

A. Yes, sir.

147 Q. In Kansas City?

A. Yes, sir.

Q. Are you acquainted with the ground known as, and that is now occupied by the St. Mary's Cemetery?

A. Yes, sir.

Q. Do you know that ground there fronting on Cleveland avenue?

A. Yes, sir.

Q. What in your opinion is the ground there worth, that is unoccupied for graves—the market value?

A. How? What medium of standard do you want to use, per foot, or per acre, or what?

Q. Well, either way, just so we can get at it?

A. Well, of course, I don't know how deep it is; and, that part that fronts on Cleveland avenue and the remainder, would have a different value. Inside ground, unimproved, in that neighborhood, would be worth per acre probably two thousand dollars per acre, for ordinary platting purposes.

Q. And would you, in giving that value, would you take into consideration the fact that it is in proximity to a cemetery, or not?

A. Yes, that is one of the things that I consider. I might illustrate, in saying that it is worth that, by stating that Haverhill Ad-

dition, immediately on the north of it, sold with sewers in for $1,250.00 an acre.

Q. That had lateral sewers in?

A. That had lateral sewers in—part of the sewers, at least; and, it isn ot quite so well located as this.

Q. Has there been any material changes in values since 1904, in that property?

148 A. 1904? Well, I think south of twenty-third street there has been probably considerable improvement—that is, it is built up with a very substantial and good class of houses. I can't remember just how it was in 1904.

Q. And——

A. (Interrupting.) The street improvements and all that kind of things, came along since that time.

Q. Could you give us your judgment what this property would be worth back there in 1904, fifteen years ago? I mean, ten years ago—ten years ago last fall?

A. Well, if you will permit comparisons—if you will let me, to elucidate it. In 1906, we bought Santa Fe Place for $4500.00 an acre, with the sewers in. I should say it wasn't as good then as now. That was a very choice location, that Santa Fe Place ground there.

Q. Was that much better ground than this?

A. Yes, and a very much better neighborhood. So, I would say it wasn't worth $2000.00 an acre, as land, at that time—probably $1250.00 or $1500.00 an acre.

Mr. Palmer: That is all.

Cross-examination by Judge Fyke:

Q. Do you know what this ground sells for—is worth per square foot, for burial purposes?

A. I don't know, only what I heard Mr. Ahern state just now. I know about what Union Cemetery ground sells for—about the same.

Q. You heard him state they had sold seventy thousand dollars' worth of it since 1904?

A. I suppose I was out at that time. I didn't hear him state that.

149 Judge Fyke: That is all.

Witness excused.

Mr. Palmer: Mr. Mullins, you take the stand, please.

W. C. MULLINS, called as a witness on the part of the defendant, Mount Saint Mary's Cemetery Association, having been duly sworn, testified as follows:

Direct examination by Mr. Palmer:

Q. You are the plaintiff in this case, aren't you?

A. Yes, sir.

Q. You are the man who built this sewer?
A. Yes, sir.
Q. Both of these sewers?
A. Yes, sir.
Q. How long have you been engaged in the sewer business in Kansas City, Mr. Mullins?
A. Off and on, over twenty-five years. I have been working in sewers here for over thirty years.
Q. You are the oldest contractor in the business here, unless it is Mike Walsh, today?
A. I have been building sewers before he was—yes.
Q. And you have built more sewers in Kansas City than any other man?
A. I don't know. I have built a good many.
Q. Now, Mr. Mullins, when you go out to figure on a job—you consider the character of property that is in the sewer district, do you not?

Judge Fyke: I object to that as foreign to any issue in this case,—how he figures on a job.
The Court: Let him answer.

150 A. Yes, sir.

(By Mr. Palmer:)

Q. You take into consideration the character of the property that is in the sewer district, do you not?
A. I take for granted that all the property in Kansas City is worth the tax bills, then, I bid on the work; or, I wouldn't bid on it.
Q. Take the same price, whether it is five feet above or below?
A. I don't know that I ever done it.
Q. Have you ever bid on work, and you take into consideration the fact that some of the lots are down in a hole or hollow?
A. Well, I always consider the hole was worth the tax bill, because, there is always somebody that has got dirt to come off of a hill that will fill the hole.
Q. Did you ever consider the fact that large tracts are owned by the same people?
A. Sir?
Q. Do you ever consider the fact that a large tract of ground might be owned by persons who might fight the tax bills?
A. That never bothers me. The bigger the tax bill, the more I like it. That don't bother me.
Q. Do you take into consideration the fact that there is likely to be a dispute in collecting them?
A. I take for granted that all tax bills are good or I wouldn't bid on the work.
Q. You take for granted that the tax bills and the owners of the property are all good?
A. Yes, sir.
Q. In the old days, did you ever consider where there was rights

of way of railroads? Did you ever consider that, as to what
151 effect that had on your tax bill?

A. No.

Q. You never did at all?

A. No, sir.

Q. Did you know that this property in Mount Saint Mary's was used for cemetery purposes when you bid on this work?

A. I did.

Q. Did you know that a large part of the ground at that time had actually been sold, and that there were graves occupying the ground as well as monuments there?

A. I knew there had been some part of this cemetery occupied by graves, a good part of it.

Q. Did you know about the previous contract for a sewer, which Mr. Youmans finally built? The contract 4—Bovard Cemetery Deed 344 12-6-15 Jenne was let to George Baer. Do you remember when that contract was let to George Baer?

A. I remember Yeomans had such a thing.

Q. Did you know that George Baer asked to be relieved from that contract, because he didn't want to be collecting from a cemetery company?

A. I never heard of it.

Q. Did you know that no tax bills had ever been sustained by the courts of Missouri against a cemetery, when you bid on this thing?

A. I never heard of such a thing.

Q. You didn't know anything about it?

A. I didn't know anything about it. I suppose the City Attorney and the City Engineer knew what they were doing. I took it to my lawyer, and asked him what I should do. I have often taken them to you, and, had your opinion.

152 Q. You never had my opinion that a cemetery tax bill was good, until brother Fyke got it established in this case, did you?

A. As a matter of fact, I don't care very much about your opinion. The only time I ever went to you for an opinion, was when my lawyer was out of the city.

Q. So that, you always assumed that all of the tax bills were collectible, and the proceedings were regular?

A. You ought to know, I have my lawyer attend to that. I take it to Mr. Fyke and have him examine the proceedings; and if Mr. Fyke passes on it, all right, and, I go on and figure my bid, and go ahead with the work.

Q. You know the location of this sewer District No. 218?

A. Yes, sir.

Q. And the extent of it, that it ran from 14th to 30th street?

A. Yes, sir.

Q. And that it ran from Benton Boulevard to Cypress avenue?

A. Well, in this first contract I didn't go any farther than 27th street; but, the district runs to 30th.

Q. And you knew the lay of the land in the district, didn't you?

A. Yes, sir.

Q. And you knew it included Mount Saint Mary's Cemetery in that?

A. Yes, sir.

Q. And didn't you know at that time, that Elmwood Cemetery was a district by itself?

A. I didn't know anything about it.

Q. Didn't you build some sewers for them?

A. Yes, sir, and, they paid for them.

153 Q. And you did it under special agreement with the City?

A. I didn't know anything about that.

Q. They promised to pay you before you ever started to work, didn't they?

A. They always paid me.

Q. Didn't they promise to pay you for that sewer before you ever put a shovel into the ground?

A. I didn't know what agreement they had with the City.

Q. Didn't they promise you?

A. They always paid me. They always pay me when the work is done.

Q. And didn't they promise to pay you before ever you started the work?

A. They might have. They always paid their tax bills, for every contract.

Q. You never tried them for building lateral sewers, did you?

A. I don't know what I did. They always paid their bills.

Q. Do you know of any use under the sun, Mr. Mullins, that these lateral sewers scattered all over there do any good to St. Mary's Cemetery?

Judge Fyke: I object to that.

The Court: Sustained.

To which ruling and action of the court the defendant, Mount Saint Mary's Cemetery Association, by its counsel then and there duly excepted.

Judge Fyke: There are thousands of houses in that district that probably couldn't connect with these lateral sewers.

The Court: Objection sustained.

To which ruling and action of the court the defendant, Mount Saint Mary's Cemetery Association, by its counsel then and there duly excepted.

154 Mr. Palmer: I think that is all.

Cross examination waived.

Witness excused.

Mr. Palmer: I think that is all, Your Honor. I want to produce those plats. I will show them to Judge Fyke; and see if there is any objection.

There is one plat that was recorded. I will simply now give the stenographer the reference to the book and page. That is the same plat that was offered, page 18 of plat Book No. B 1 records of the

office of the Recorder of Deeds for Jackson County, Missouri, at Kansas City, and the filing of that; and that is described, the description is contained on page 38 of the Abstract of Record.

Said plat so offered in evidence is in the words, figures, lines and drawings as follows, to-wit:

This plat is exhibit No. 50 hereinafter reproduced.

Mr. Palmer: That is our case, with the exception of those plats, Mr. Fyke.

Here the defendant, Mount Saint Mary's Cemetery Association, rested its case.

Rebuttal.

Whereupon, the plaintiff, in rebuttal of defendant's evidence, then offered and introduced evidence oral and documentary in the words and figures following, to-wit:

155 J. L. STUBBLEFIELD, called as a witness on the part of the plaintiff, in rebuttal, having been duly sworn, testified as follows:

Direct examination by Judge Fyke:

Q. State your name to the court?
A. J. L. Stubblefield.
Q. What is your business, Mr. Stubblefield?
A. Civil engineer.
Q. How long have you been engaged in that business?
A. About thirty years.
Q. You live here in the city?
A. I live here—yes, sir.
Q. Did you recently go out to Cleveland avenue and Twenty-first street—or that neighborhood—to examine whether or not there was a sewer connection between the ground of the Cemetery and this sewer?
A. Yes, sir.
Q. State what you found?
A. I found a ten inch pipe running from a box about four feet square—a brick box, in the cemetery—running from there into the manhole in the center of Twenty-first and Cleveland avenue—connected with a ten-inch pipe; and, there was a pipe running from this brick box over in the draw in the cemetery—two or three joints—to run the water from the draw out through this pipe; and, then, there was another pipe coming down from the north—I didn't see where it come from—that run over the top of the box.

156 Q. Did you see a water closet in the vicinity there?
A. Yes, sir.
Q. And, how far away from this brick box that you have mentioned?
A. About two hundred and fifty feet, I think.
Q. Do you know whether that water closet has any outlet, or not?
A. I examined it—but it was partly filled up.

Q. Was it feasible and practicable to have an outlet from that closet into this box?

A. Yes, sir.

Q. Nothing hard about that?

A. No, sir.

Q. You don't know, as a matter of fact, whether there was a pipe that run from that closet to this box, or not?

A. No, sir. It started in that direction—but, I couldn't tell.

Q. What is the topography of the ground there, near where this brick box was built?

A. The ground falls from Twenty-third street down to this brick box, at Twenty-first street; and, also falls from the north, towards that. There is a draw that comes down from near Twenty-third and Jackson to this point—the box; and, the ground slopes both ways in there.

Q. So that, there is a place for the surface water to come across the cemetery ground to this box?

A. Yes, sir.

Q. That runs nearly diagonally across the cemetery ground, doesn't it?

A. Yes, sir.

Q. If it had no outlet there—what is the condition of Cleveland avenue at that point?

A. There is quite a deep fill across there to Cleveland avenue.

Q. About how much of a fill is there there, Mr. Stubblefield?

A. Well, about ten or fifteen feet.

Q. Now, if there was no ten inch pipe above there, what would be the effect of the surface water coming down there? Would it have any outlet?

A. It would fill up and run over Cleveland avenue.

Q. How deep a lake would it make there?

A. It would make a lake ten feet deep, or more.

Q. And what area do you think it would cover?

A. It would be a couple of hundred feet long—probably longer than that; and, a hundred feet wide, maybe.

Judge Fyke: I think that is all, Mr. Stubblefield.

Cross-examination by Mr. Palmer:

Q. Mr. Stubblefield, as I understand—this point that has been filled up there, that has no outlet. That has been caused by the grading of Cleveland avenue—by the filling on Cleveland avenue?

A. Yes, sir.

Q. And when they filled in Cleveland avenue—they put the pipe in there, and put the pipe in the sewer?

A. Put the pipe in the sewer.

Q. Which side is lower there?

A. The west side is lower.

Q. If the sewer hadn't been there, and they hadn't put the pipe

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under the ground—as far as leaving this ground—would it leave it just the same?

A. Yes, sir.

Redirect examination by Judge Fyke:

Q. Unless somebody filled up the lots on the west side?

158 A. Yes. Then, it would have had no place to travel.

Q. There would be no outlet for this water?

A. No.

Judge Fyke: That is all.

Witness excused.

JAMES E. FARIS, called as a witness on the part of the plaintiff, in rebuttal, having been duly sworn, testified as follows:

Direct examination by Judge Fyke:

Q. What is your business, Mr. Faris?

A. Real estate business.

Q. How long have you been in that business?

A. About eighteen years.

Q. Are you acquainted with the value of ground out about Twenty-third and Cleveland avenue—where this Mount Saint Mary's Cemetery ground is?

A. Yes, sir.

Q. You have examined that, have you?

A. Yes, sir.

Q. Now, take that just as ordinary ground there—without any other improvements, and the streets as they are there. What in your judgment is that ground worth, per acre?

Mr. Palmer: Now, or both times?

(By Judge Fyke:)

Q. Both in 1904, and now?

A. The ground at this time would plat, and, would be

159 worth from fifteen to twenty dollars a foot—according to the location—some of it being higher than the other. The Twenty-third street frontage is good ground, and it is higher than it would be further north.

Q. How many feet do you figure to the acre, when it is platted?

A. Twenty-five hundred front feet.

(By Mr. Palmer:)

Q. You don't mean twenty-five hundred feet, Mr. Faris?

A. No—two hundred and fifty feet, I mean.

(By Judge Fyke:)

Q. To the acre?

A. Yes—platted frontage—two hundred and fifty feet per acre.

Q. And at twenty dollars per front foot, that would be worth five thousand dollars per acre?

A. Yes, sir.

Q. You think that would be a fair price for it, do you?
A. I think so. That is, for some of it—some of it would be higher priced.
Q. Now, do you have any knowledge what it would be worth for cemetery purposes?
A. No, I have not.
Judge Fyke: That is all.

Cross-examination by Mr. Palmer:

Q. Did you take into consideration in giving the value to Mr. Fyke, the fact that it is right adjoining and part of a cemetery?
A. Yes, sir.
Q. Would that affect its market value any?
A. Some, yes.
160 Q. How much?
A. It might affect the value of the ground. But, the value of the ground on the south side of Twenty-third street, is worth twenty-five to thirty dollars a foot.

(By Judge Fyke:)

Q. That is right adjacent to this cemetery?
A. Yes, sir.

(By Mr. Palmer:)

Q. Take the ground where graves already exist, Mr. Faris. What is the market value of that ground?
A. For residence purposes?
Q. What is the market value of it—to go right out and sell it? Suppose you had a customer to take out there—and, say, now, here is seventeen acres of land covered with graves and monuments. What could you sell it to him for?
A. I think a man who would try to dispose of anything like that would be an idiot.
Q. You couldn't dispose of it for anything—could you?
A. Nothing—other than the purpose it was used for at that time.

Witness excused.

W. F. WALLER, called as a witness on the part of the plaintiff, in rebuttal, having been duly sworn testified as follows:

Direct examination by Judge Fyke:

Q. What is your business, Mr. Waller?
A. Real estate.
Q. With what firm are you connected?
A. I was connected with the firm of Wood, Waller & Holts about ten or twelve years; but now I am alone.
161 Q. How long have you been in the real estate business in this city?
A. About fifteen years.
Q. Are you familiar with the value of land in the vicinity of

Twenty-third and Cleveland avenue, this city?
A. Yes, sir.
Q. Have you examined this cemetery tract out there?
A. Yes, sir.
Q. Tell the court what in your judgment that land is worth an acre?
A. You mean the whole tract as a whole—or just the unoccupied part?
A. Take the unoccupied part first?
A. I put it at about $3,500.00 an acre.
Q. Are you familiar with the value of it as cemetery purposes?
A. No, I am not.

Judge Fyke: That is all.

Cross-examination by Mr. Palmer:

Q. That is the present value of it?
A. Yes, sir.
Q. Mr. Waller, I want you to fix the value of it in 1904?
A. In 1904? Well, I don't think there has been much change.
Q. Did you hear Mr. Moore testify here?
A. Yes, sir.
Q. Did you know Santa Fe Place, that Mr. Moore bought at that time?
A. I don't know. There is two Santa Places, East and West. I don't know which one he bought.
Q. West Santa Fe Place. That property is very much more desirable for residence purposes than this other is, isn't it?
A. It is better.
162 Q. Did you hear Mr. Moore testify that he bought that, with sewers all in, for $2,500.00 an acre?
A. Yes, sir.
Q. And that, you say, is much better property?
A. That is no criterion. He may have bought it below its value. A man may go out and buy a house fifty per cent under the value.
Q. Did you hear him testify that Haverhill Addition, immediately north of this, sold for $1,500.00 an acre?
A. Yes, sir. That is no criterion, either. Sometimes they might sell land too high, and sometimes too cheap.
Q. Do you know of any property out there selling for $3,500.00 an acre, Mr. Waller?
A. I would like to give $3,500.00 an acre for this property.
Q. What would you give for this property there that is all covered with graves and monuments?
A. Sir?

(By Judge Fyke:)

Q. If you wanted to go into the cemetery business, Mr. Waller?
A. Yes. But, I would like to sell it at $3,500.00 an acre, I would like to dispose of it at that price.

(By Mr. Palmer:)

Q. After it has been sold out once, you wouldn't want it?
A. I would like to sell it over again.
Q. You wouldn't sell out graves, would you?
A. No.
Q. Do you know how long a time it would take to sell it?
A. No, I never sold any graves.

Mr. Palmer: That is all.
Witness excused.

163 JOSEPH OVERLY, called as a witness on the part of the plaintiff, in rebuttal, having been duly sworn, testified as follows:

Direct examination by Judge Fyke:

Q. State your name to the court.
A. Joseph Overly.
Q. What is your business, Mr. Overly?
A. I am connected with the real estate business.
Q. Are you familiar with the values of real estate in Kansas City, in the vicinity of 23rd and Cleveland avenue?
A. Yes, sir.
Q. Have you examined this property?
A. Yes, sir.
Q. What in your judgment would that property, without any improvements, on Cleveland avenue there—that cemetery ground—be worth an acre?
A. About $4,000.00 an acre.
Q. In 1904, and now?
A. Yes, sir.
Q. Now, do you know anything about what the lots there that sell for burial purposes—what they are worth?
A. Yes, sir.
Q. How do you know, Mr. Overly?
A. I bought one.
Q. How long ago?
A. I bought one six years ago.
Q. How much ground did you buy?
A. I bought ten by twenty feet.
Q. What did it cost you?
A. Seventy cents per square foot.
164 Q. That was six years ago?
A. Yes, sir.
Q. That was since this suit was brought?
A. Yes, sir.
Q. And you paid that for it?
A. Yes, sir.
Q. Well, now, another thing I would like to know: Do you know what their rule or custom is about planting shrubbery and flowers or anything of that kind, on the land of the cemetery, whether they do

it free of charge, or charge the man that is owning the lot?
A. They charge for it.
Q. That is additional income then from the sale of the lot?
A. Yes, sir.
Q. Suppose a grave settles, is there any charge for refilling it, do you know?
A. I do not.
Q. Or re-sodding?
A. I do not.
Q. You have some of your family buried in this cemetery?
A. Yes, sir.

Judge Fyke: That is all.

Cross-examination by Mr. Palmer:

Q. Cutting the grass and taking care of the sod and land—that isn't charged for, *it is*?
A. That is my understanding. I always take care of our own grave there. My understanding is, that if you want to have your lot taken care of you have to pay for it.
Q. Did you ever get that understanding from Mr. Ahern?
A. I think my wife told me that.
Q. Did you ever read the rules, Mr. Overly?
A. My wife told me. I wanted to go out and take care of our lot.
165 Q. Are you interested in the result of this case?
A. Some, little.

Mr. Palmer: That is all.
Judge Fyke: That is all.
Witness excused.

Judge Fyke: The answer sets up a failure to complete this work on time. I don't know whether they are making any point on that or not. I have a witness coming—if they do make any point on it.
The Court: I don't believe they have introduced any evidence as to when it was completed.
Mr. Palmer: Yes. But, I will say, frankly, this: That while on the face of it the time overran—yet, it included a winter; and, now, my own personal judgment is—I haven't consulted Judge McCune and Mr. Moore—but, my own personal judgment is, that the time is good.
Judge Fyke: I can prove they were delayed at least fifty days, on account of zero weather and rain—if there is any point about it. I have the witness coming.
The Court: I don't believe they have reached that point.
(After discussion between defendants' counsel.)
Mr. Palmer: No, my friends agree to that. We have no doubt—the fact that there was winter there, and that would really cover twenty-odd days.
Judge Fyke: The weather wasn't as fine as in spring and summer.

They had two or three floods—and, on one occasion, they had
166 two inches of rain and on another occasion three inches. I have figured it up—and, the loss is over fifty days on account of rain.

Mr. Palmer: Do you want to put in that testimony?

Judge Fyke: Not unless you make some point on it.

Mr. Palmer: No.

The Court: Is that all of your evidence?

Judge Fyke: That is all of ours.

Here the plaintiff rested his case.

Surrebuttal.

Whereupon the defendant, Mount Saint Mary's Cemetery Association, in surrebuttal of plaintiff's rebuttal evidence, offered evidence oral and documentary in the words and figures following, to-wit:

JOHN E. AHERN, called as a witness on the part of the plaintiff, Mount Saint Mary's Cemetery Association, in surrebuttal, testified further as follows:

Direct examination by Mr. Palmer:

Judge Fyke: What is this?

Mr. Palmer: I don't know the nature of it; but, it is with reference to the last witness—about taking care of the lots there.

The Witness: The Cemetery Association, since the raise in the price of lots in 1904—they are cared for by the Association
167 and, in fact, the entire grounds—the cutting of the grass and cleaning of the lot, and all of that.

(By Mr. Palmer:)

Q. And is a custodian provided for the grounds to keep watch over them and track of them, to see that no harm is done, or anything of that sort?

A. No, sir.

Q. As Secretary, you are the custodian of the grounds?

A. Yes, sir.

Q. I suppose that any special shrubbery that any one wants on their lot—they are privileged to put it there, are they not?

A. People are privileged to sod their own graves, or anything like that—provided, they conform to the rules of the Cemetery Association, and don't make it anyways hideous—or make it so we can't get over it with the lawn mower.

Q. Something has been said about the expectancy of the cemetery there, with reference to the length of time it will take to sell out the property of the cemetery. Just explain that, Mr. Ahern?

A. The lifetime of the cemetery from the time spoken of here, 1904, would be about twenty-three years.

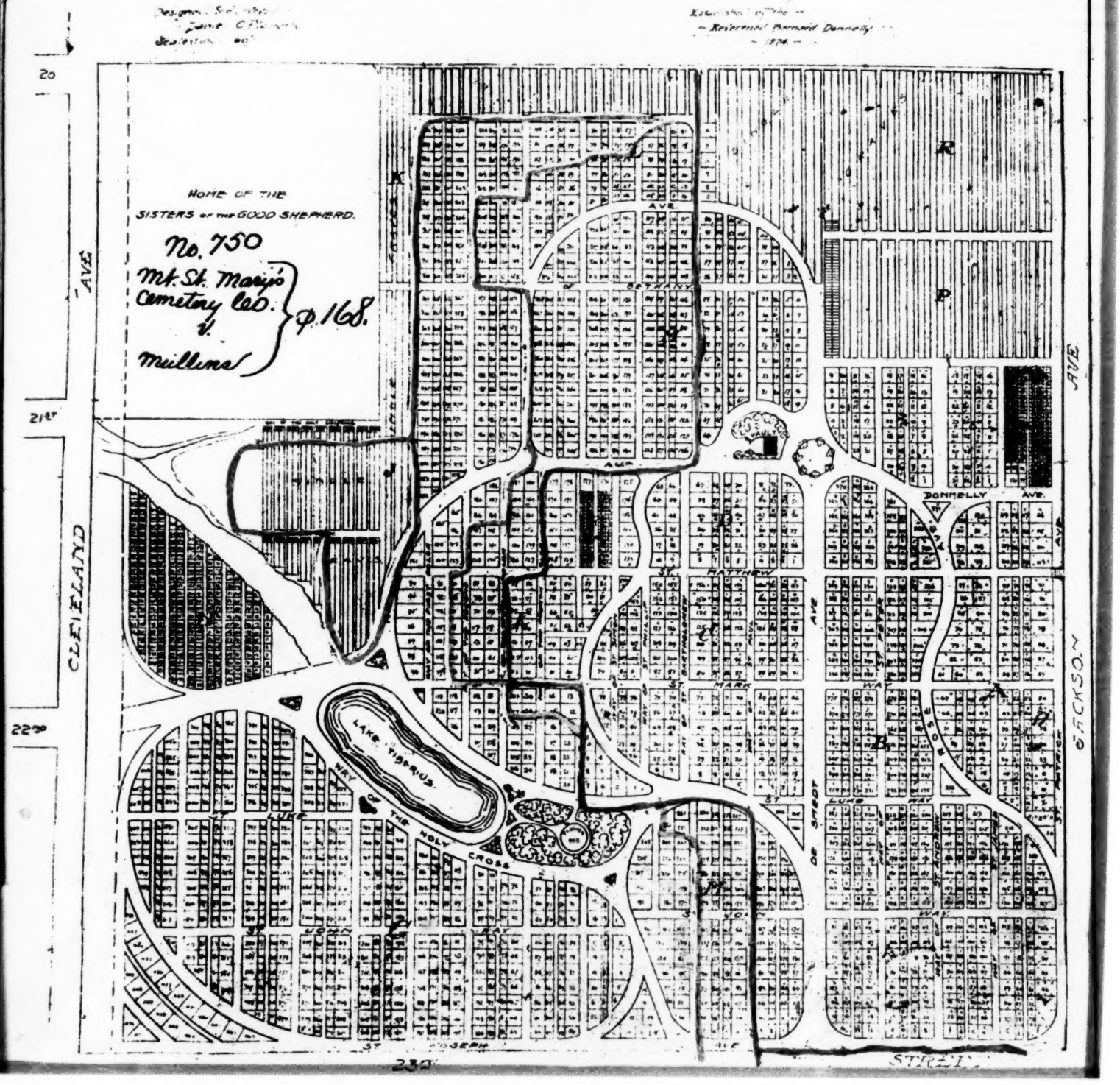
Mr. Palmer: I think that is all. Except, I want——

Cross-examination by Judge Fyke:

Q. Now, when you plant shrubbery you charge for that?

A. No, sir.

Mt. St. Mary's Cemetary



#750
~~Mt. St. Mary's Cemetery Assn.~~
v
Mullins
#169

Mt. St. Mary's Cemetery

a Subdivision of the S.E. ¼ of N.E. ¼ Sec. 10 Tp. 49. R. 33.

Scale : 60 feet to 1 Inch

DANIEL and EDMOND O'FLAHERTY
SURVEYORS

Know all men by these presents that Mount. Saint Mary's Cemetery Assotiation has caused to be surveyed and subdivided into lots of the dimensions and numbers as represented on the annexed map for the uses and purposes of a Catholic Cemetery.
The land subdivided being 24 ¼ acres of the south end of the south east quarter of the north east quarter of Section ten (10) Township forty nine (49) Range Thirty three (33) in Jackson County Missouri
In witness whereof the President of said Mount St. Mary's Cemetery has hereunto subscribed his name and affixed the corporate seal of said association this 15th day of January 1878

(Corporate Seal)

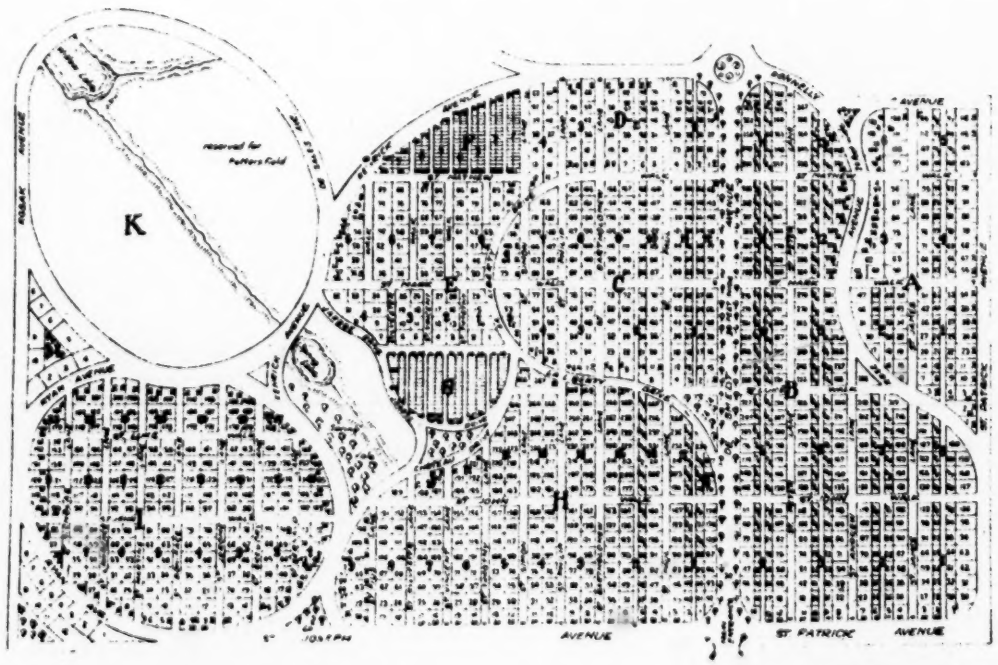
Thomas Corrigan
President of Mount Saint Mary's
Cemetery Association

State of Missouri } ss.
County of Jackson }

Be it remembered that on this 15th day of January 1878 before the undersigned Notary Public within and for said County (whose commission expires Dec 17th 188[illegible]) personally appeared Thomas Corrigan President of Mount St. Mary's Cemetery Assotiation and who is personally known to me to be the person who executed the foregoing instrument of writing and he acknowledged that he executed the same as his voluntary act and deed as such President and as the act of said association
In testimony whereof I have hereunto set my hand and affixed my notarial seal the date last above written.

Bernard Donnelly (Notary Public)
NOTARY PUBLIC

Dimensions of the square lots are 20 x 20 feet . The half squares are 20 x 10
The dimensions of the fractional lots is marked on said lots.



A true copy of the original plat
Little & Hare Civil Engineers

filed for record this 15th day of January A.D 1878
Chas D. Lucas
Recorder

This plat is truly copied from the original in my office attest Chas D. Lucas Recorder

This plate is a plat of the ten acres on the North of the twenty four acre tract whose plat was recorded in 1878 it is the oldest part of the Cemetery and is largely filled with Graves. This plat is not recorded, but lots have been sold according to it.

Mt. St. Mary's Cemetery

#750.
Mount St. Mary's Cemetery Assn.
v.
Mullens
$ 170-

Designed & Surveyed by
Daniel O'Flaherty
Scale. 1 inch = 60'

Established by the —
Reverened Bernard Donnelly
— 1874. —

All of a tract of land described as follows to-wit: bounded on the East by the West line of Jackson Ave as the South by the Northerly lines of Donnelly and Kendrick Avenues as the same is marked and designated on plat now of record of Mt St Mary's Cemetery and on the West by a tract of land owned by the Sisters of the Good Shepherd, and on the North by the North boundary of a tract containing forty acres off of the South end of the E 1/2 of the NE 1/4 of Section 10 Town 49 Rg 33 said described tract shall hereafter be known as Mt St. Mary's Cemetery and shall be used as a cemetery Signed by its President and attested by its Secretary this day of 1907.

Bernard Corrigan (Seal)
President

(Seal)
Jno. E. Aher
Secretary.

State of Missouri }
County of Jackson }

On this 2nd day of April 1907 before me personally appeared Bernard Corrigan, President to me known to be the person described in and who executed the foregoing instrument and who acknowledged that he executed the same as his free act and deed. In testimony whereof I have hereunto set my hand and affixed my official seal at my office in said County the day and year first above written.

My term expires June 30, 1909.

James E. Gibson
Notary Public

East Line of tract owned by the Sisters of the Good Shepherd

Boulevard Ave

20

21ST

E 1/2

GRAVES AVE.

ST CHARLES

ST LOUIS

WAY OF THE HOLY CHILDHOOD

WAY OF THE HOLY INFANT

SINGLE

KENDRICK

BETHANY AVE.

VAULT

DONNELLY AVE.

JACKSON AVE.

170

Q. If you dig graves on Mr. Overly's lot, you charge for that?
A. All cemeteries do that.
Q. That is in addition to the price of the lot, isn't it?
171 A. Yes. The others all charge $7.50; but we charge $5.00.

Redirect examination by Mr. Palmer:

Q. Except—you said, when a single grave is sold you charge for that?
A. Yes sir, and the digging and sodding.
Mr. Palmer: That is all.
Judge Fyke: That is all.
Witness excused.

Mr. Palmer: We offer in evidence these three maps of Mount Saint Mary's Cemetery.
Said maps so offered in evidence were marked Exhibit "50," Exhibit "51" and Exhibit "52," respectively, and are in the words, lines, figures and drawings following, to-wit:

(Here follow diagrams marked pages 168, 169 and 170.)

Here the defendant, Mount Saint Mary's Cemetery Association, rested its case.
Here the plaintiff rested his case.
172 And the foregoing was all the evidence offered and introduced on the trial of this case.
Thereupon, the plaintiff asked the court to declare the law in said cause, and requested the court to give each and every one of the following declarations of law:

"I."

"The court declares the law to be, that under the pleadings and evidence plaintiff is entitled to a special judgment against the land described in the first count of the petition." **("Given.")**

"II."

"The court declares the law to be, that under the pleadings and evidence plaintiff is entitled to a special judgment against the land described in the second count of plaintiff's petition." ("Given.")

Which declaration of Law numbered "I" and "II," and each of them, the court gave over the objection of defendant, Mount St. Mary's Cemetery Association; and to which ruling and action of the court in giving said declarations of law so numbered, and to the giving of each of them, the defendant, Mount Saint Mary's Cemetery Association, by its counsel then and there duly excepted and still excepts.

Thereupon the defendant, Mount Saint Mary's Cemetery Association, asked the court to declare the law, and requested the court to give each and every one of the following declarations of law:

173 "Declaration of Law, D. 1.

"The court declares the law to be that if the court finds from the evidence that at the time of the enactment of the ordinance establishing sewer district No. 218, and for several years prior thereto, the land described in the tax bills which constitute the plaintiff's cause of action, was held and used by defendant and those claiming under it, only for cemetery purposes, and continued to be so used until the present time, and that no sewers were constructed into or through the land described in said special tax bills, and that there was no necessity of any such sewers and that the same constitute no present nor prospective substantial benefit to the land of this defendant, and that there was no present or prospective necessity for any sewer to be extended into or through said land in order to furnish adequate facilities for the surrounding land, and if the court further finds that there was no reason why said cemetery should not have been established as a sewer district by itself without including other lands, then the enactment of the ordinance establishing sewer district No. 218, and the enactment of the ordinances providing for the construction of the sewers for which the tax bills in suit were issued, were an unreasonable and oppressive exercise of the powers of the city as to this defendant's interest in the land described in said tax bills, and said tax bills are void and constitute no lien against the said land described therein." ("Given.")

174 "Declaration of Law, D. 2.

"2."

The court declares the law to be that if the court finds from the evidence that at the time of the issue of the special tax bills upon which this suit was brought, approximately one-half of the area of the land described in said special tax bills had been sold and was actually used and occupied for the purpose of the burial of the dead, and that said use and occupation was visible and open, and that in only one-half of the area of said land the defendant had any substantial beneficial interest, then the enforcement of the whole amount of each of the special tax bills in suit, as a gross amount, against all the land described in said tax bills, would be a taking of the property of the defendant without due process of law, in violation of the provisions of Section 30, Article 2, of the Constitution of Missouri, and of Section 1, of the Fourteenth Amendment of the Constitution of the United States, and said tax bills are therefore void; and said enforcement would further be in violation of Sec. 1 of the Fourteenth Amendment of the Constitution of the United States, in that it denies to this defendant the equal protection of the laws." ("Refused.")

"Declaration of Law, D. 3.

"3."

The court declares the law to be that if the court finds the facts as set out in declaration of law No. 2, asked by the defendant, and further finds that no notice was given of the proposed enact-
175 ment of the ordinances for establishing said sewer district No. 218, nor of the ordinances providing for the construction of said sewers, nor any opportunity for a hearing on any of said matters; then as to the interest of the defendant in the land described in said tax bills said ordinances are void and the enforcement of the same would be a taking of the property of this defendant without due process of law, in violation of section 30, Art. 2, Constitution of Missouri, and Section 1 of the Fourteenth Amendment of the Constitution of the United States." ("Refused.")

Declaration of Law, 4.

"4."

The court declares the law to be that under the pleadings and the evidence the finding and judgment of the court must be for the defendant." ("Refused.")

"5."

"MULLINS,
v.
ST. MARY'S CEM.

Declaration Asked by Defendant.

"The court declares the law to be that if the court finds from the evidence that as to a portion of the land described in the tax bills in evidence, the defendant has no beneficial interest except the reversion if the lots cease to be used for burial purposes, and that other persons have a beneficial interest in said lots consisting of the right to use said lots perpetually for burial purposes, then the interest of defendant in the entire tract described in said tax bills
176 cannot be sold separately to pay the entire amount of said bills." ("Refused.")

Which declaration of law numbered "1" the court gave, over the objection of plaintiff; and to which ruling and action of the court in giving said declaration of law so numbered, the plaintiff by his counsel then and there duly excepted.

And which declarations of law numbered "2," "3," "4" and "5," and each and every one of them, the court refused to give; and to which ruling and action of the court in refusing to give said declaration of law so numbered, and in the court's refusal to give

each and every one of them, the defendant, Mount Saint Mary's Cemetery Association, by its counsel then and there duly excepted and still excepts.

And afterwards, and on the same day, to-wit: On Tuesday, the 4th day of May, 1915, and at said March term, 1915, of said circuit court, the court, under the pleadings, the evidence and the declarations of law aforesaid, gave judgment for plaintiff on the first count of his petition for the sum of Thirty-six Thousand One Hundred and Thirty-five and 65/100 Dollars, and gave judgment for plaintiff on the second count of his petition for the sum of Three Thousand and Twelve and 59/100 Dollars; and,

Thereupon the court ordered and directed, and there was entered of record in said cause by the clerk of said court, in record 310 at pages 53 and 54 thereof the following Judgment Entries: (Record 310, page 53.)

177 "53.

48th Day March Term, 1915. Tuesday, May 4th, 1915.

33917.

W. C. MULLINS, Plaintiff,

v.

MOUNT SAINT MARY'S CEMETERY ASSOCIATION and THE FIRST NATIONAL BANK OF KANSAS CITY, MISSOURI, Defendants.

Now at this day this cause having been regularly assigned to this division of the court and the plaintiff appearing by his attorney, and the defendant, Mount Saint Mary's Cemetery Association, appearing by its attorneys, and the First National Bank of Kansas City although having been duly served with process herein, and having filed an answer herein, fails further to appear, and the jury having been waived, and all parties announcing ready for trial, the cause is taken up and submitted to the court on the pleadings and the evidence, and the court finds from the evidence that the first count in plaintiff's petition is founded upon a special tax bill issued by Kansas City, Missouri, to the plaintiff, W. C. Mullins, on the 12th day of October, 1904, for the sum of Seventeen Thousand Five Hundred and Ninety-eight and 25/100 ($17,598.25) Dollars as a special tax against the following described real estate in Kansas City,

178 Jackson County, Missouri, to-wit: Part of the Southeast Quarter (S. E. ¼) of the Northeast Quarter (N. E. ¼) of Section Ten (10), Township Forty-nine (49), Range Thirty-three (33), more particularly described as follows: beginning at a point on north line of said Quarter Quarter three hundred and seventy-five (375) feet east of the northwest corner thereof; thence south four hundred and sixty-five (465) feet; thence west three hundred and thirty-five (335) feet; thence south and parallel with west line of said quarter quarter to south line thereof; thence east along said south line to the west line of Jackson Avenue; thence north

along the west line of Jackson Avenue to the north line of said quarter quarter; thence west to beginning.

And the court finds that said special tax bill bears interest from its date at the rate of ten (10%) per cent. and the court finds that there is now due upon said special tax bill the sum of Thirty-six Thousand One Hundred and Thirty-five and 65/100 ($36,135.65) Dollars, and the court finds that said sum is a special lien and charge against the above described real estate and the court finds the issues for the plaintiff.

Wherefore it is considered, ordered and adjudged by the court that plaintiff have and recover special judgment against said real estate above described for said sum of Thirty-six Thousand One Hundred and Thirty-five and 65/100 ($36,135.65) Dollars, and that the same be and is hereby declared to be a special lien and charge upon said real estate above described.

Wherefore it is considered, ordered and adjudged by the court
179 that plaintiff recover a special judgment for said sum of Thirty-six Thousand One Hundred and Thirty-five and 65/100 ($36,135.65) Dollars against said real estate and that said real estate be sold to satisfy the same, and that special execution issue therefor, and for costs."

(Record 310, page 54.)

"54.

48th Day March Term, 1915. Tuesday, May 4th, 1915.

33917.

W. C. MULLINS, Plaintiff,
v.
MOUNT SAINT MARY'S CEMETERY ASSOCIATION and THE FIRST NATIONAL BANK OF KANSAS CITY, MISSOURI, Defendants.

Now at this day this cause having been regularly assigned to this division of the court and the plaintiff appearing by his attorney, and the defendant, Mount Saint Mary's Cemetery Association, appearing by its attorneys, and the First National Bank of Kansas City although having been duly served with process herein, and having filed an answer herein, fails further to appear, and the jury having been waived, and all parties announcing ready for trial, the cause is taken up and submitted to the court on the pleadings and the evidence, and the court finds from the evidence that the second count in plaintiff's petition is founded upon a special tax bill issued by
180 Kansas City, Missouri, to the plaintiff, W. C. Mullins, on the 12th day of October, 1904, for the sum of One Thousand Five Hundred and Thirty-one and 71/100 ($1,531.71) Dollars as a special tax against the following described real estate in Kansas City, Jackson County, Missouri, to-wit: Part of the Southeast Quarter (S. E. ¼) of the Northeast Quarter (N. E. ¼) of Section

Ten (10), Township Forty-nine (49), Range Thirty-three (33), more particularly described as follows: Beginning at a point on north line of said Quarter Quarter three hundred and seventy-five (375) feet east of the northwest corner thereof; thence south four hundred and sixty-five (465) feet; thence west three hundred and thirty-five (335) feet; thence south and parallel with west line of said quarter quarter to south line thereof; thence east along said south line to the west line of Jackson Avenue; thence north along the west line of Jackson Avenue to the north line of said quarter quarter; thence to beginning.

And the court finds that said special tax bill bears interest from its date at the rate of ten (10%) per cent. and the court finds that there is now due upon said special tax bill the sum of Three Thousand and Twelve and 59/100 ($3,012.59) Dollars, and the court finds that said sum is a special lien and charge against the above described real estate, and the court finds the issues for the plaintiff.

Wherefore it is considered, ordered and adjudged by the court that plaintiff have and recover special judgment against said real estate above described for said sum of Three Thousand and
181 Twelve and 59/100 ($3,012.59) Dollars, and that the same be and is hereby declared to be a special lien and charge upon said real estate above described.

Wherefore it is considered, ordered and adjudged by the court that plaintiff recover a special judgment for said sum of Three Thousand and Twelve and 59/100 ($3,012.59) Dollars against said real estate and that said real estate be sold to satisfy the same, and that special execution issue therefor, and for costs."

To which ruling and action of the court in rendering said judgment against defendant, Mount Saint Mary's Cemetery Association, and in favor of plaintiff, W. C. Mullins, and to the ruling and action of the court in ordering and directing said judgment entry, and to the making and entering of record of said judgment entry in said cause, the defendant, Mount Saint Mary's Cemetery Association, by its counsel then and there duly excepted and still excepts.

And afterwards, and within four days from the rendition of judgment in said cause, to-wit: on Saturday, the 8th day of May, 1915, and at said March Term, 1915, of said circuit court, the defendant, Mount Saint Mary's Cemetery Association, filed its motion for a new trial and its motion in arrest of judgment in said cause in the words and figures following:

182 "In the Circuit Court of Jackson County, Missouri, at Kansas City, March Term, 1915.

WILLIAM C. MULLINS, Plaintiff,

v.

MOUNT SAINT MARY'S CEMETERY ASSOCIATION et al., Defendants.

Motion for New Trial of Mount Saint Mary's Cemetery Association.

Now comes Mount Saint Mary's Cemetery Association, one of the defendants above named, and moves the court for an order granting a new trial of the above entitled action for the following reasons:

First. Because the court erred in admitting improper evidence on behalf of the plaintiff against the objection of the defendant.

Second. Because the court erred in refusing to admit proper and competent evidence offered on behalf of the defendant.

Third. Because the court erred in giving each of the declarations of law asked by the plaintiff, to the giving of which declarations the defendant at the time duly excepted.

Fourth. Because the court erred in refusing to give each of the declarations of law asked by the defendant, to which refusal defendant duly excepted.

183 Fifth. Because the finding and judgment of the court upon all the evidence should have been in favor of the defendant.

Sixth. Because the finding and judgment of the court is contrary to law.

Seventh. Because the finding and judgment of the court amount to the taking of the property of this defendant without due process of law, in violation of Section 30, of Article 2, of the Constitution of Missouri, and Section 1, the Fourteenth Amendment of the Constitution of the United States.

Eighth. Because the finding and judgment of the court deny to this defendant, the equal protection of the law, in violation of the Fourteenth Amendment of the Constitution of the United States.

(Signed) WILLIAM MOORE,
H. L. McCUNE,
CLARENCE PALMER,
Attorneys for Defendant Mount Saint Mary's Cemetery Association."

Endorsed on the back thereof is the following:

"33917. William C. Mullins, Plaintiff, v. Mount Saint Mary's Cemetery Association, et al., Defendants. Motion for New Trial of Mount Saint Mary's Cemetery Association. McCune, Harding, Brown & Murphy, Lawyers, Kansas City, Mo. Filed Div. 3, May 8, 1915. James B. Shoemaker, Clerk by W. G. Donnelly, D. C."

184 "In the Circuit Court of Jackson County, Missouri, at Kansas City, March Term, 1915.

No. 33917.

WILLIAM C. MULLINS, Plaintiff,
v.
MT. ST. MARY'S CEMETERY ASSOCIATION and THE FIRST NATIONAL BANK OF KANSAS CITY, MISSOURI, Defendants.

Motion in Arrest of Judgment.

Now comes the defendant, Mt. St. Mary's Cemetery Association, and moves the Court to set aside and arrest the judgment for the plaintiff in this case for the following reasons:

First. Because the judgment was rendered in favor of the plaintiff when upon the whole record the judgment should have been rendered for the defendant.

Second. Because upon the face of the whole record the judgment for the plaintiff is erroneous.

Third. Because the whole record shows upon its face that the judgment is in violation of the Constitution and laws of the State of Missouri and of the Constitution of the United States and the Amendments thereto.

(Signed) WILLIAM MOORE,
H. L. McCUNE,
CLARENCE PALMER,
Attorneys for Mt. St. Mary's Cemetery Association."

185 Endorsed on the back thereof is the following:

"33917. W. C. Mullins, Plff. v. Mount St. Mary's —. Arrest of Judgment. Wm. Moore, H. L. McCune, Clarence Palmer. Attys. Filed Div. 3. May 8, 1915. James B. Shoemaker, Clerk, By W. G. Donnelly, D. C."

And afterwards, to-wit: On Saturday, the 29th day of May, 1915, and at the May Term, 1915, of said Circuit Court, the court overruled defendant, Mount Saint Mary's Cemetery Association's Motion for a New Trial so filed in said cause; and to which ruling and action of the court in overruling said Motion for a New Trial the defendant, Mount Saint Mary's Cemetery Association, by its counsel then and there duly excepted and still excepts.

And afterwards, and on the same day, to-wit: On Saturday, the 29th day of May, 1915, and at said May Term, 1915, of said circuit court, the court overruled defendant, Mount Saint Mary's Cemetery Association's Motion in Arrest of Judgment so filed in said cause; and to which ruling and action of the court in overruling said Motion in Arrest of Judgment the defendant, Mount Saint Mary's Cemetery Association, by its counsel then and there duly excepted and still excepts.

And afterwards, to-wit: On Saturday, the 19th day of June, 1915, and at said May Term, 1915, of said circuit court, the defendant, Mount Saint Mary's Cemetery Association, filed its Application and Affidavit for Appeal in said cause in the words and figures following:

186 "In the Circuit Court of Jackson County, Missouri, at Kansas City, May Term, 1915.

No. 33917.

W. C. MULLINS, Plaintiff,
v.
MOUNT SAINT MARY'S CEMETERY ASSOCIATION et al., Defendants.

Affidavit for Appeal.

STATE OF MISSOURI,
County of Jackson, ss:

William Moore, being duly sworn, makes oath and says that he is one of the attorneys and is agent of the above named defendant, Mount Saint Mary's Cemetery Association, and makes this affidavit on its behalf, and that the appeal prayed for in the above entitled cause is not made for vexation or delay, but because the affiant believes that the appellant is aggrieved by the judgment and decision of the court.

Wherefore, the appellant, Mount Saint Mary's Cemetery Association, asks that its appeal be granted to the Supreme Court of the State of Missouri.

(Signed) WILLIAM MOORE,
Attorney for Mount Saint Mary's Cemetery Association, Defendant.

Subscribed and sworn to before me this 29th day of May, 1915.
(Signed) JAMES B. SHOEMAKER,
Clerk Circuit Court of Jackson County, Missouri,
By D. S. McCLANAHAN, *Deputy.*

187 Endorsed on the back thereof is the following: "33917. W. C. Mullins v. Mount St. Mary's Cemetery Assn. Affidavit for Appeal. Filed Jun. 19, 1915. James B. Shoemaker, Clerk, By W. G. Donnelly, D. C."

And afterwards, and on the same day, to-wit: On Saturday, the 19th day of June, 1915, and at said May term, 1915, of said circuit court, the court sustained defendant, Mount Saint Mary's Cemetery Association's said Application and Affidavit for Appeal so filed in said cause, and granted and allowed said defendant, Mount Saint Mary's Cemetery Association, an appeal in said cause to the Supreme Court of the State of Missouri; and,

Thereupon, the court granted and allowed said defendant, Mount Saint Mary's Cemetery Association, time for filing its Bill of Exceptions in said cause until on or before the 1st day of September, 1915; and,

Thereupon the defendant, Mount Saint Mary's Cemetery Association, presented its Appeal Bond in said cause to the Court, in the sum of Ten Thousand ($10,000.00) Dollars, duly executed, with Mount Saint Mary's Cemetery Association as principal, and Massachusetts Bonding and Insurance Company as surety,—which said Appeal Bond was duly approved by the court and ordered filed in said cause, and, said Appeal Bond was thereupon marked filed and filed of record by the clerk of said court.

188 & 189 Wherefore, the said defendant, Mount Saint Mary's Cemetery Association, prays the court to settle this its Bill of Exceptions to all and singular the acts, rulings and orders of said court in the premises; and that the same may be signed, sealed and made a part of the record herein; which is now accordingly done.

Given under the hand and seal of the Honorable J. Seehorn, Judge of Division No. 3 of said Circuit Court, before whom the said proceedings were had, this 28th day of August, 1915.

[SEAL.] THOS. J. SEEHORN,
Judge of the Circuit Court of Jackson County, Missouri, at Kansas City, Division No. 3.

* * * * * * *

190 In the Supreme Court of Missouri.

And thereafter, to-wit, on Saturday, January 15th, 1916, the following further proceedings were had and entered of record in said cause.

19011.

W. C. MULLINS, Resp.,
vs.
MT. ST. MARY'S CEM. ASS'N, App.

Come now the said parties, by attorneys, and after arguments herein submit this cause to the court.

191 In the Supreme Court of Missouri.

And thereafter, to-wit, on Wednesday, July 5th, 1916, the following further proceedings were had and entered of record in said cause.

19011.

W. C. MULLINS, Respondent,
vs.
MOUNT SAINT MARY'S CEMETERY ASSOCIATION, Appellant.

Appeal from the Circuit Court of Jackson County.

Now at this day come again the parties aforesaid, by their respective attorneys, and the court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Circuit Court of Jackson County rendered, be in all things affirmed, and stand in full force and effect, and that the said respondent recover against the said appellant his costs and charges herein expended and have therefor execution. (Opinion filed.)

Which opinion of the court is in words and figures as follows, to-wit:

192 In the Supreme Court of Missouri, Division Two, April Term, 1913.

No. 19011.

W. C. MULLINS, Respondent,
v.
MOUNT SAINT MARY'S CEMETERY ASSOCIATION et al., Defendants; MOUNT SAINT MARY'S ASSOCIATION, Appellant.

Statement.

Plaintiff recovered judgment on special tax bills for sewer construction. The defendant has appealed. This is the third appeal in the case. See. 239 Mo. 681 and 259 Mo. 142.

The petition is in two counts, the first being based on a tax bill issued October 12, 1904, for $17,598.28, and the second on a tax bill issued Sept. 1, 1905, for $1,531.71. Both bills bear interest, in case of default, from date at ten per cent.

Sewer district No. 218, in which the work was done, was established by ordinance on August 2, 1901. It is the largest in the city, containing about 407 acres. It is over a mile and a half long north and south, and nearly three fourths of a mile wide in the middle. The land slopes from the east and west sides to the middle line, and there is a general incline to the north. The cemetery is composed of a square sixteenth of a section, except four acres belonging to the Home of the Sisters of the Good Shepherd in the northwest
193 corner, and excepting such part as may be in the streets on the east, south and west sides of it, the cemetery proper containing about thirty four acres. The evidence on the point is not clear, but tends to show that the most of the surface water of the

cemetery runs to the west, gathering considerably towards the part just south of the Home of the Good Shepherd. When unrestrained it passes onto and over the adjoining land. To what extent such surface water flows northward onto adjoining land is not shown.

The tax bills in controversy were issued for the construction of lateral sewers, some of which with manholes and catch basins therein extend along the south and west sides of the cemetery and along the north fourth of the east side. There is no street along the north side; but there are three streets and four alleys extending from the north and terminating in culs-de-sac at the cemetery line. Sewers were placed in those alleys with manholes in each close to such line. None of those sewers were laid in the cemetery grounds. No openings in the sewer pipes were made on the sides next the cemetery for house connections, but the evidence shows that such openings are often made by the plumbers when the connections are made.

In grading the street on the west a ten feet fill was made near the northwest corner of the cemetery. The grading contractor placed a ten inch pipe so as to lead the water from the cemetery into the manhole at that point, thus preventing the formation of a pond. There are two waterclosets in the defendant's grounds, neither of which connects with the sewers. The defendant has an eight inch pipe about 400 feet long laid in the cemetery for the purpose of drawing the water towards the west.

The cemetery's existence began in 1877. The corporation is a charitable one and has no capital stock. About half the land in the cemetery has been disposed of in lots to purchasers for burial
194 purposes prior to 1904. There had been about 9,000 interments, the number being about 15,000 at the time of the last trial. The lots sell at from fifty-five to seventy cents a square foot. The bylaws of defendant provide that one-third of the money received for lots sold shall constitute a maintenance fund to be loaned at interest, the income to be used in caring for the cemetery. The evidence shows that the land in that vicinity for other than cemetery purposes, is worth from $1,250 to $5,000 an acre. Witnesses both for plaintiff and defendant testified that the location of the cemetery affected the value of the land in the vicinity, but they did not say whether it enhanced or depreciated it. The defendant offered to prove that two other cemeteries in Kansas City had each been made a separate sewer district, but the evidence was excluded. The trial court also excluded evidence offered by defendant to show that two other special tax bills for the construction of sewers in that district had been issued against defendant prior to those in suit, one for $9,104.30, and the other for $1,611.15. The plaintiff was put on the stand by the defendant and testified that when he made his bid for the work he knew that the land of the defendant was used for a cemetery. He also testified that he had built some sewers for Elmwood Cemetery.

On the two questions, as to whether and to what extent sewers are necessary to cemeteries generally and to this one in particular, and as to whether the inclusion of this cemetery in such district was a

reasonable exercise of the power of the Common Council, there was no evidence offered except as shown in the above statement.

194½ *Opinion.*

I.

The first point in appellant's brief is therein stated as follows:

"As to the property of this defendant, the imposition of the special assessments in question could result in no possible benefit, actual or potential. The acts were manifestly oppressive and an unreasonable exercise of municipal authority and therefore void. The trial court erred in not so finding and deciding."

In its printed argument is this statement:

"The testimony shows from the topography of the district that there was no engineering reason why this tract of land might not have been established as a sewer district by itself and thus relieved of all burden of the construction of lateral sewers which are essential to the comfort and health of the living, but which are entirely useless for the city of the dead."

There is a presumption in favor of the reasonableness of such an ordinance, and the burden of establishing the contrary rests upon the objector. Hislop v. Joplin, 250 Mo. 588; St. Louis v. Theatre Co., 202 Mo. 690.

That prima facie case must be overcome "in the most satisfactory manner." Morse v. City of West Port, 110 Mo. 502.

The language of appellant's counsel is an unequivocal claim that it has no need for sewers and is under no obligation to furnish them to others; in other words, that its cemetery, for the purpose of sewer construction at least, has ceased to be a part of the city within whose vitals it is situated.

195 We will first consider the question as to whether such a cemetery is benefited by the construction of sewers. "Drainage of a district for sanitary purposes is the ground upon which the compulsory construction of sewers, and the imposition of special taxes to pay the cost thereof, is authorized." Johnson v. Duer, 115 Mo. l. c. 377.

In Prior v. Construction Co., 170 Mo. 439, it was held that plaintiff's property, located on high ground, was benefited by the construction of a sewer which prevented its sewage from being cast upon the streets and sidewalks and into the cellars in a lower part of the district. In other words, each tract of land in a city should bear its portion of the burden of preventing the passage of any noxious thing from it into or onto other lands. Whatever discharges that burden is a benefit to the property whence the noxious substance emanates. Concede that the dead are indifferent to the question, the living have a right to demand that noxious substances shall not be disseminated from a cemetery into and over other lands. "Thou shalt not bury a dead man in the city" was one of the laws of the twelve tables.

In Kincaid's Appeal, 66 Pa. St. 411, Sharswood, J. said: "No one can doubt the power of the legislature to prohibit all future interments within the limits of towns or cities. In ancient times, in Greece and Rome such was the universal rule."

In Lowe v. Prospect Hill Cemetery Ass'n 58 Neb. 94, the defendant was enjoined from using a tract of ground in Omaha as a cemetery. The evidence showed that the ground in that vicinity was very pervious. Expert witnesses testified that disease germs often existed and multiplied in dead bodies, and were disseminated thence through the ground into neighboring lands, contaminating them, and rendering the water in the wells noxious to the health of the inhabitants. Other cases of like import are Clark v. Law-
196 rence, 6 Jones Eq. (N. Car.) 83; Jung v. Meraz, 71 Tex. 396; Los Angeles v. Hollywood Cem. Ass'n 124 Cal 344; Kingsbury v. Flowers, 65 Ala. 479. Sohier v. Trinity Church, 109 Mass. 1; Partridge v. First Independent Church of Balt. 39 Md. 631. See also Joyce's Law of Nuisances, sec. 393.

In Town of Lake View v. Letz, 44 Ill. 81, the court had under consideration an ordinance which prohibited the opening of any cemetery in the town (Township) without the permission of the trustees. It was there said:

"There are some things which in their nature are nuisances, and which the law recognizes as such. There are others which may or may not be so, their character in this respect depending on circumstances. Now, the town of Lake View is a rural township, containing about eleven sections or square miles of territory. It is therefore impossible to hold, that a cemetery, anywhere within the limits of the town, must be necessarily a nuisance, and can be prohibited in advance as such. A cemetery may be so placed as to be injurious to the public health, and therefore a nuisance. It may, on the other hand, be so located and arranged, so planted with trees and flowering shrubs, intersected with drives and walks, and decorated with monumental marbles, as to be not less beautiful than a public landscape garden, and as free from all reasonable objection."

In Lake View v. Rose Hill Cem. Co., 70 Ill. 191, is the following: "Burial place are indispensable. Convenient to the city of the living, a depository of the dead must be established and maintained. It concerns the public health, and if such places
197 were not prepared by private enterprise, it would be the duty of the State to act in the premises."

It will be noticed that the court does not there approve the location of cemeteries in populous cities. It speaks of them in places "convenient to the city of the living." On the other hand, it was said in Ellison v. Commissioners, 58 N. Car. 57, "If the grounds be arranged and drained and the burial of the dead be conducted as elsewhere in such establishments, we incline decidedly to the opinion it will not be a nuisance either public or private."

We cite those cases only for the purpose of showing that the defendant is not justified in asserting that its land should have been excluded from the sewer district merely because it is a cemetery.

There is no evidence in the case to show that sewers are not beneficial in the sanitation of this cemetery. In the absence of a showing to the contrary, we must presume that the Common Council was fully informed on that subject, and acted properly in accordance with that information. The evidence does show that the sewers for the construction of which the tax bills were issued serve to carry away the surface water from the cemetery.

Appellant claims that the cemetery might have been made into a sewer district by itself, so as to relieve it of the burden of construction of the lateral sewers. True, it might have been done; but there is no reason appearing why it should have been done. The appellant complains, not that a discrimination was made against it, but that no discrimination was shown in its favor. We have seen that the law has through all the past discouraged the location of cemeteries in populous districts. Real estate men who were witnesses on both sides in this case testified that the cemetery affected the value of real estate in that vicinity. We feel justified in assuming that such value was thus affected adversely. There is no sound reason
198 why the cemetery should be relieved of its share of the burden of getting rid of a condition caused to some extent by its presence there. The district, so far as we can understand the situation, is homogeneous, a proper "unit" in the general system of sewers. By carrying out the work of sanitation the cemetery may become more and more a comfort and an ornament to the community, and that community may become a more attractive framework for the cemetery.

There is another fact in the case which deserves consideration. The tax bills against the land of the defendant seem very large. That is caused by the fact that there are thirty-five acres in the cemetery. The "area rule" is firmly grounded in our law. The common Council had no choice in the matter except to tax the cemetery in proportion to its area, or relieve it altogether. It doubtless appreciated the serious difficulties in the matter, but its judgment must stand in the absence of evidence sufficient to show that it was unreasonable. Complaint is made that the court excluded evidence offered by defendant to show that in two other cases cemeteries were made separate districts. Whether the facts connected therewith were similar to those in this case is not shown. It may have been found by experience that such discrimination in favor of the cemeteries was not just to the other land in the vicinity.

II.

Appellant contends that as there was no provision in the law for giving it notice of the proceedings resulting in the issuing of the special tax bills in question, an enforcement of such tax bills will result in taking its property without due process of law. It
199 is sufficient to say that such tax bills are legislative assessments, and no notice is necessary unless required by "some charter, ordinance, or statutory provision to the contrary." Embree

v. Road District, 257 Mo. 593. That opinion was affirmed on writ of error to the Supreme Court of the United States. 240 U. S. 243.

III.

Appellant makes the following point: "The judgment of the trial court in enforcing the whole amount of the special tax bills as a single lien against the property now owned by defendant, including that part of the amount of said tax bills computed on the area of land already sold by defendant, amounts to a denial to the defendant of the equal protection of the laws, in violation of section 1 of the 14th Amendment to the Constitution of the United States."

We are furnished with no authorities or even argument on that proposition. On the last appeal it was held, in effect, that the ownership of all the land in the cemetery for the purpose of such taxation is in the appellant. Such being the case, the tax bills were properly issued against the cemetery as an entirety.

IV.

Complaint is made that the trial court erred in excluding evidence as to two other tax bills for sewer purposes issued against its property. We are bound to presume that all other property in the district paid in the same proportion. Without deciding whether such exclusion was error, we hold that it was not such error as calls for a reversal herein.

The judgment is affirmed.

REUBEN F. ROY,
Commissioner.

Williams, C., concurs.

200 *Per Curiam:*

The foregoing opinion of Roy, C. is adopted as the opinion of the Court. All concur.

201 In the Supreme Court of Missouri.

And thereafter, to-wit, on Saturday, July 15th, 1916, the following further proceedings were had and entered of record in said cause.

19011.

W. C. MULLINS, Resp.,
vs.
MT. MARY'S CEM. ASS'N, App.

Comes now the said appellant, by attorney, and files a motion for rehearing herein; also motion to transfer this cause to the court in banc.

Which said motions for rehearing and a transfer to the court in banc are in words and figures as follows, to-wit:

202 In the Supreme Court of Missouri, Division No. 2, October Term, 1915.

No. 19011.

W. C. MULLINS, Respondent,
v.
MOUNT SAINT MARY'S CEMETERY ASSOCIATION et al., Appellants.

Motion for Rehearing.

Now comes appellant in the above entitled action, Mount Saint Mary's Cemetery Association, and respectfully asks the Court for a rehearing of the above entitled action for the following reasons:

First. That in the determination of the questions whether the ordinances under which the special tax bills in suit were issued was reasonable or not, the Court overlooked the fact that our contention was directed not against a sewer for general drainage purposes, but against a lateral sewer which, as the record in this case showed, was a system of sewers running to a very large proportion of the separate lots and blocks in the district for the purposes of house drainage, as well as of general drainage.

Plans of the sewer showed that provisions was made for connecting with every lot in a large part of the sewer district and that nearly all of the district was platted into lots for building purposes, most of these with a frontage not exceeding fifty feet and a depth of about one hundred and thirty five feet. Our suggestion that the practicability of the procedure of making a cemetery a sewer district by itself made it unreasonable not to adopt that method was made on the theory not that such a method would constitute an exemption of the cemetery from assessment for such drainage as it needed, but that such procedure would have prevented the obvious injustice of making this land, which can never need such lateral sewers as are required for house connections, contribute to the building of a sewer to practically every lot in the district.

203 The court in stating our contention overlooked the fact that we were discussing lateral sewers. We meant by lateral sewers the very kind of sewers provided by the plans in evidence, that network of pipes extending to every lot in a great part of the district. The needs of the part of this district platted into lots for the use of the living are manifestly much greater than for a thirty-five acre tract which would only need drainage for storm water.

Making a cemetery a sewer district by itself does not in any respect make it cease to be a part of the city. It can still be included in a joint sewer district and always is so included, if it is within the watershed. In addition, if, for any reason, separate sewers are required in the district composed of the cemetery, they can be ordered by the city. But putting the cemetery into a district by itself would prevent the gross injustice of making thirty-four acres of ground, which needs no such improvements, pay for lateral sewers which are only needed for the living. The injustice is aggravated by the fact

that this tract of ground, which does not need this kind of sewers, is not platted into lots and blocks, with surrounding public streets, and has to help pay for the sewer on the basis of forty-three thousand, five hundred and sixty square feet to the acre, while ground platted for commercial purposes, which does need such sewers as are shown on these plans, has a net area per acre, after taking out the streets and alleys, of from one-fourth to one-fifth less than the full area. It is because such an injustice could have been avoided by the exercise of reasonable intelligence that we urge that the action really taken was unreasonable as to this property. The cases cited in our brief show that where there can be no material benefit a special assessment cannot be sustained.

It seems to us that the discussion by the court of the possible sanitary menace of the cemetery finds no basis in the record. There was no testimony on this subject.

204 There was no testimony that the cemetery, when opened, was in the city limits. On the other hand, the statutes of the State show it was not.

The City Charter in 1873 made the southern limits of Kansas City the center line of sections Seven, Eight and Nine, Township Forty-nine, Range Thirty-three, and the eastern limits the center of Section Nine. (Laws of 1873, page 280) The land in questions was a part of the S. E. ¼ of the N. E. ¼ of Section 10, Township 49, Range 33. That left the east half of Section 9 and the West three-fourths of Section 10 between the city limits, at that time, and the western limits of the cemetery. Besides this court has held that the employment by the City of indirect methods is not a proper way to get rid of the unsanitary conditions caused by a cemetery, if any such exist.

Union Cemetery Association v. Kansas City, 252 Mo. 466.

Second. For the reason that the Court in its opinion overlooked the essential difference in treatment between this defendant and any other land holder by ruling that the amount of a special tax bill against land which it owns may be determined by including the amount apportioned against a practically equal tract in which it had no beneficial ownership. The statement by the Court that this proposition was not argued convinces us that we were unfortunate in our attempt to express our views, and we, therefore, ask that the case be reheard in order that we may present this matter more fully. We have set up the matter contained in this paragraph more fully in a motion filed for a transfer of this case to the Court en banc, and we refer the Court to such motion for a fuller statement regarding this question.

We press this motion for rehearing with the more earnestness for the reason that the decision, if it stands, will have a disastrous effect upon interests of the defendant, from the fact that questions

205 presented on all the appeals of this case in this court have been novel questions in the jurisprudence of this state, and from the sincere conviction that the affirmance of this judgment for

the full amount will operate as such a hardship against the defendant as has never been caused by any special assessment in the history of the State.

For the reasons stated we ask that a motion for rehearing may be granted and that this cause may be transferred to the Court en banc, in order that a final determination of the novel and important questions raised may be made by a majority of the Supreme Court of this State.

Respectfully submitted,

HENRY L. McCUNE,
WILLIAM MOORE AND
CLARENCE S. PALMER,
Attorneys for Appellant.

To Messrs. Fyke & Snider, Attorneys for Respondent:

Notice is hereby given that the motion hereto attached, for the rehearing of the above entitled action, will be mailed to the Clerk of the Supreme Court for filing, on the 14th day of July, 1916.

HENRY L. McCUNE,
WILLIAM MOORE,
CLARENCE S. PALMER,
Attorneys for Appellant.

Received a copy of the foregoing notice and motion this 14th day of July, 1916.

FYKE & SNIDER,
Attorneys for Respondent.

206 In the Supreme Court of Missouri.

Division No. 2. October Term, 1916.

No. 19011.

W. C. MULLINS, Respondent,
vs.
MOUNT SAINT MARY'S CEMETERY ASSOCIATION et al., Appellants.

Motion to Transfer Case to Court en Banc.

Now comes appellant in the above entitled action, Mount Saint Mary's Cemetery Association, and respectfully asks the Court for an order transferring said cause to the Court en banc, as provided by section Four of the Amendment of 1890 of the Constitution of Missouri, for the reason that a federal question is involved in the decision of said cause.

The answer filed in the court below set out the federal question in the following language (Record pages 16 and 17):

"Further answering, defendant alleges that at the time of the issuance of the tax bills described in plaintiff's petition to the plaintiff,

approximately the east half of the land owned by defendant was actually used and occupied for burial purposes; that the plats and records in the office of the Recorder of Deeds of Jackson County, in Kansas City, and the actual occupation of the land, showed that said land was occupied for cemetery purposes, and by actual occupation showed that in approximately one-half of the land the defendant had no beneficial interest, but that the same had passed to various grantees; and defendant alleges that, while it had a superintending control over said land and possible rights of reversion therein, its beneficial interest had passed to various grantees in the part of the land at that time actually used and occupied for burial purposes; that said facts were known to the officers of the city and to the city, and that the officers of said city had no right or author-
207 ity to issue a single tax bill, including therein not only the property of which the defendant had the absolute title, but also the property in which defendant had ceased to have any beneficial interest. Defendant alleges that the effect of including all the property in one special tax bill was to double the burden upon the property in which the defendant has the full title and compel this property to remove all burden from the remainder of said ground, in which the defendant has no beneficial interest and the care of which constitutes a liability against this defendant. Defendant further alleges that if any assessment could be made at all against the land of defendant, that the apportionment should have been made in two special tax bills, so that the land of which defendant still retains control might have to pay for only the proportional part of the cost of the sewer assessed against said land; that the issue of said tax bill against the whole of said land to a single tract constitutes a denial to this defendant of the equal protection of the law, and is a violation of the Fourteenth Amendment of the Constitution of the United States."

A declaration of law asked by appellant presented the same question (Record page 164.)

"The court declares the law to be that if the court finds from the evidence that at the time of the issue of the special tax bills upon which this suit was brought, approximately one-half of the area of the land described in said special tax bills had been sold and was actually used and occupied for the purpose of the burial of the dead, and that said use and occupation was visible and open, and that in only one-half of the area of said land the defendant had any substantial beneficial interest, then the enforcement of the whole amount of each of the special tax bills in suit, as a gross amount, against all the land, described in said tax bills, would be a taking of the property of the defendant without due process
208 of law, in violation of the provisions of Section 30, Article 2, of the constitution of Missouri, and of Section 1, of the Fourteenth Amendment of the Constitution of the United States, and said tax bills are therefore void; and said enforcement would further be in violation of Sec. 1 of the Fourteenth Amendment of the Constitution of the United States, in that it denies to this defendant the equal protection of the laws."

This declaration was refused by the trial court. Attention of the trial court was called to this matter by the motion for a new trial, in the following language (Record page 173):

"Because the finding and judgment of the court denied this defendant the equal protection of the law in violation of the Fourteenth Amendment of the Constitution of the United States."

The undisputed evidence under which we claim the application of the protection of the Constitution of the United States, as thus stated, showed that, at the time of the issue of the tax bills in question, the defendant Cemetery Company had sold practically one-half of the land included in said tax bills; that it no longer had any interest in the same, except a supervisory control with reference to the use of the land for burial purposes and a reversion in case the land ceased to be used for burial purposes. The rights of some of the grantees were evidenced by deeds, some of which were recorded and are shown in the record; some were evidenced by perpetual licenses recorded and shown in the record. And by the testimony of the record practically one-half of the ground was in actual use for burial purposes by grantees of the Company under deeds and licenses. The testimony further showed that the ground already sold and used for burial purposes, after such sale and use, had practically no market value. The testimony also showed that a part of the ground covered by the tax bills had been platted into lots and blocks and the plat had been filed in the office of the Recorder of Deeds.

209 Our contention was and is that issuing one tax bill in gross against all of the land, whether owned by the defendant or not, and where the amount of the bill was determined by including the entire area of the land already sold with the land still owned by defendant, was a denial to defendant of the equal protection of the law, for the reason that as to no other land holder is such a rule enforced. We thought we had argued this proposition in our brief. We set forth fully these facts. We showed that under the decisions of this court, where the law provides that each lot shall be assessed separately, a tax bill is invalid which is assessed against several tracts in gross.

Neenan v. Smith, 50 Mo. 525;
City of St. Louis v. Provenchere, 92 Mo. 66;
Fowler v. St. Joseph, 37 Mo. 228.

We refer to our brief, pages 27 to 37, inclusive for a fuller discussion of this question. We cited the Kansas City Charter of 1889, Section Ten, Article 9, which provides that a special tax bill for the amount of a special tax against each lot in the district is the only manner in which the issue of a tax bill to pay for sewers is authorized, and we cited decisions of the Supreme Court of the United States showing that the application of a discriminating rule without reason is depriving a party of the equal protecton of the laws. It is true that this court held on a prior appeal that it was not necessary to assess each cemetery lot separately, and that the

fact that the grantees took a qualified interest in the property for burial purposes only still left such an interest in the defendant that all the lots might be assessed together. We did not understand that case, however, as holding that the title of the cemetery company to the land which it had already sold and for which it had received payment was the same kind of a title and interest as it had in the land undisposed of. We submit that such could not have been the ruling of this court, because it was not supported by any evidence, but the uncontradicted evidence showed the con-
210 trary. The decision of the Circuit Court, now affirmed by this court, brings about this result; that while any other land owner in the state of Missouri can sell a part of his land and get the money for it, whether he retains a reversion or not, he cannot be compelled to have the land which he has not sold burdened with a charge determined by the area of the land which he has sold. More than that he may file a plat of his lands, dividing it into several lots, and by this very act make it incumbent upon the city to issue separate special tax bills against each lot so that no lot is encumbered with any burden except its own share of the public improvement. This being the consideration of provisions of the law relating to the issue of special tax bills like that contained in the Kansas City Charter, we do not see how a clearer case of a denial of the equal protection of the laws can arise than one in which seventeen acres of land which are of value can be encumbered with a special assessment against thorty-four acres, one-half of which the defendant no longer owns for any practical or beneficial purposes and which would bring nothing on a sale of the property under this judgment for two reasons: first, because the testimony in this case shows that it is worth nothing; and, second, because the grantees from the defendant, who have the ownership subject only to the supervisory control and the right of the reversion were none of them made, parties to the suit. Therefore, in order that this question, which is a novel question in this state and which we submit is clearly a federal question, may be determined by the court en banc, as provided by the constitution, we ask that an order be made transferring this case to the court en banc for final determination.

Respectfully submitted,

HENRY L. McCUNE,
WILLIAM MOORE AND
CLARENCE S. PALMER,
Attorneys for Appellant.

211 To Messrs. Fyke & Snider, Attorneys for Respondent:

Notice is hereby given that the motion hereto attached, for the transfer of the above entitled action to the Court en banc, will be mailed to the Clerk of the Supreme Court for filing on the 14th day of July, 1916.

HENRY L. McCUNE,
WILLIAM MOORE,
CLARENCE S. PALMER,
Attorneys for Appellant.

Received a copy of the foregoing notice and motion this 14th day of July, 1916.

FYKE & SNIDER,
Attorneys for Respondent.

212 In the Supreme Court of Missouri.

And thereafter, to-wit, on July 18th, 1916, the following further proceedings were had in said cause and entered of record.

19011.

W. C. MULLINS, Resp.,
vs.
MT. ST. MARY'S CEM. ASS'N, App.

Now at this day the court having considered and fully understood the motions, heretofore filed herein by said appellant for a rehearing herein or to transfer this cause to the court in banc doth order that said motions be and the same are hereby overruled.

213 Which said opinion, in said cause, of the court reported in the 259 Mo. at page 142, is in words and figures as follows, to-wit:

In the Supreme Court of Missouri, Division No. Two, April Term, 1914.

No. 18025.

W. C. MULLINS, Appellant,
vs.
MOUNT ST. MARY'S CEMETERY ASSOCIATION and THE FIRST NATIONAL BANK OF KANSAS CITY, MISSOURI, Respondents.

Statement.

This is a suit on a special tax bill, in which judgment went for the defendant. The petition was filed July 24th, 1907, and is in two counts based on special tax bills for the construction of sewers. The first count is on a bill for $17,598.28, dated October 12th, 1904. It is payable in four annual installments, beginning May 31st, 1905. It bears seven per cent interest, with the provision that if there is default in the payment of any of the installments the whole shall become due and bear ten per cent from the date of the tax bill. The second count is on a bill for $1,531.71, dated September 1, 1905, bearing interest at ten per cent per annum. Both said bills are against the land included in Mount St. Mary's Cemetery in Kansas City, containing about thirty-five acres.

The answer admits that the defendant owned the land and alleges that it holds the land as trustee for the improvement of Mount St.

Mary's Cemetery, of which said land is a part, and also for certain orphan asylums of Kansas City, except such portions or lots thereof as it has sold and conveyed for burial lots. It alleges that the land described is a public cemetery, thirty-five acres in area, not connected in any way with the sewer or sewers for the construction of which said tax-bills are alleged to have been issued, and that in building said sewers there was no provision made by which drains on
214 said land should be connected with said sewers and that said cemetery lands derive no benefit whatever from said sewers and that the tax-bills equal or exceed the total value of the land.

That for said reasons the ordinances authorizing the issuance of the tax bills in this suit are void becaue they are fraudulent and oppressive and the enforcement of the tax bills in this suit would constitute a taking under the guise of taxation of the private property of the defendant for public use without any compensation and is in violation therefore of section- 2, 21 and 30 of article 2 of the constitution of the State, and also in violation of the 14th amendment to the constitution of the United States. There is no allegation that the plaintiff knew of or was a party to such fraud.

It alleges that the cemetery grounds have been duly platted into lots and the plats thereof filed in the office of the recorder of deeds of Jackson County, Missouri; that many of said lots have been sold and conveyed to persons who are now the beneficial owners and that the act of the Kansas City Board of Public Works in apportioning the special taxes for the construction of said sewer against the thirty-five acre cemetery tract as one lot was in violation of article 8 section 7 of the charter of Kansas City, Missouri.

The reply was a general denial.

A jury was waived by the parties and the trial was before the court. The plaintiff introduced the tax-bills in evidence. The defendant introduced in evidence its charter and articles of association, dated December 24, 1898, also its by-laws which included the following:

"8. The Board of Directors shall have power to make additional by-laws from time to time for the government of this association, which are not inconsistent with the constitution or laws of the United States or of the State of Missouri. And it shall also have power to prescribe rules and regulations from time to time governing the use and maintenance of the cemetery grounds, which shall be binding on the association and on all lot holders in said
215 cemetery.

"9. The Board of Directors shall have power to see to it that the cemetery grounds and all additions and extensions thereto shall remain in a proper state of ornament and repair, and may from time to time dispose of lots in said cemetery, which shall, however, be used for no other purpose.

"The surplus funds of this association shall from time to time be used and applied to the support and relief funds needed by local Catholic orphan asylums in Jackson County, Missouri, by and with the consent of the Bishop of the Kansas City Diocese.

"10. One-third of the receipts from the sale of lots shall be set aside as a maintenance fund, and the interest thereof devoted to the perpetual care of cemetery."

Said cemetery was originally laid out in 1877 by a corporation under the same name as that of the defendant and of which the defendant seems to be merely a continuation. Prior to such incorporation in 1898, the deeds made by the cemetery corporation to the lot holders contained the words "grant, bargain and sell" in the granting clause, and also had the following clause:

"To have and to hold the same unto the said party of the second part, his heirs and assigns only as a place of burial, subject, however, to the conditions, stipulations and regulations hereto annexed and made part of this deed, and which are the conditions upon which this deed is made," followed by a clause of general warranty.

The annexed stipulations and regulations, among other things, contained the following: "1. No lot shall be used for any other purpose than as a place of burial for the dead."

Prior to 1898 there were sold 850 lots by deeds of that character. After the incorporation of defendant in 1898, purchasers of lots were not given deeds of conveyance for the lots, but they received certificates, each of which stated that the holder thereof was entitled to the exclusive use of the lot therein named for the interment of members of his family forever, subject to the by-laws, rules and regulations of the defendant. Since the adoption of that
216 form, certificates of that character have been issued for about 600 lots. The evidence for the defendant shows that there have been more interments in single graves than in lots. About one-third of the area of the cemetery remains undisposed of to lot owners.

Plaintiff asked the following instruction, which was refused:

"The court declares the law to be that if the court finds from the evidence that the land described in the tax bill sued on is enclosed in one general enclosure, and the said land is under the charge and control of the defendant cemetery association, then it was legal and proper to issue the special tax bills against the same, as one tract, and the special tax bills are legal and valid as against whatever interest the said defendant has in said land, and plaintiff is entitled to a special judgment against said land, and whatever interest said defendant has therein."

The court gave the following instruction for defendant:

"1. The court, sitting as a jury, declares the law to be: That if the court finds from the evidence that a part of the tract of land described in the tax bills in evidence, at and prior to the dates when the ordinances mentioned in said tax bills were passed, was used for the purposes of a cemetery, and had, prior to said dates, been platted into cemetery lots and that a plat of said cemetery had, prior to said dates, been filed in the office of the recorder of deeds for Jackson County, Missouri, and that some of said lots had, prior to said dates, been conveyed by the defendant to other persons, and deeds therefor had been filed for record and had been recorded in the office of said recorder of deeds, prior to said dates, then said

tax bills are void and the finding must be for the defendant."

There is no evidence in the case as to whether any sewer was laid in the cemetery grounds, nor as to how near such sewer is to those grounds. Neither is there any evidence as to the size or topography of the sewer district, or the relative position of the cemetery therein.

217 *Opinion.*

I.

On the question as to whether cemetery grounds are subject to sale for the payment of special tax bills for the construction of a sewer, the opinion of this court on the former appeal (239 Mo. 681) is conclusive on the parties herein.

II.

In order to determine whether the tax bills were properly issued against the entire tract which constitutes the cemetery, or whether separate bills should have been issued against each lot therein, it is necessary to determine the character of the ownership of the lots by the so-called lot owners. All the deeds and certificates under which lots are held in this cemetery provide that they are held for burial purposes only.

The first case on the subject in the United States is that of the Brick Presbyterian Church, 3 Edw. Ch. 155, decided by the Chancery Court of New York in 1837. It held that purchasers of burial lots in church grounds holding by deeds of lease and release took the fee. That case was quoted in Windt vs. German Reformed Church, 4 Sandf. 471. But in the latter case the lot holder did not claim under a deed, so that reference to the former case was merely obiter. Since then many cases have been decided. Some of them involved lots held under conveyances by warranty deed in fee simple. In some the lot holders had a mere certificate entitling each to bury in the specified lot. In others there was no deed or certificate. But all of them decide that the lot holder has no title to or ownership in the lot, but has a mere easement or burial right, subordinate to the ownership of the corporation or trustees owning the cemetery.

In the case of the Reformed Presbyterian Church of New York, 7 How. 476, decided in 1853, it was held that deeds to lot holders containing the words, "do sell, convey and confirm unto the party of the second part, his heirs and assigns forever, to be used for the purpose of a burial place only, that certain piece of ground,"
218 etc., were grants of the use of the lot as a place of burial in subordination to the right of the corporation in the freehold, and that the trustees had a right to sell in compliance with the statute and remove the remains of the dead, under the order of court. The case of Went vs. Methodist Protestant Church, 80 Hun. 266, involved the rights of persons holding burial lots under deeds of full warranty purporting to convey the title to the land. The court said, l. c. 271:

"The question of title cannot be determined solely by the terms of the deed given to the lot owner. Reference must of course be had to the act of the legislature creating the corporation from which title is derived and to the limitations upon its power and to the manifest intent of the parties to the instrument. Every owner of a cemetery lot must be deemed to have purchased and to hold it for the sole purpose of using it as a place of burial, and, as was said in Kincaid's case, he is bound to know at his peril that it may become offensive by the residence of many people in its vicinity and that its use must yield to laws for the suppression of nuisances." See also Kincaid's Appeal, 66 Pa. St. 411; Perkins vs. Lawrence, 138 Mass. 361; Sohier vs. Trinity Church, 109 Mass. 1; Partridge vs. Independent Church of Baltimore, 39 Md. 631; Richards vs. Northwest Protestant Church, 32 Barb. 42; State vs. Scoville, 78 Conn. 90. The only case involving the very question now under consideration is Buffalo City Cemetery vs. City of Buffalo, 46 N. Y. 506. That was a suit to enforce the payment of a special assessment for the construction of a sidewalk. It was held that the assessment was properly made against the entire cemetery grounds. We need not add to what is said in those cases. They show clearly that if the separate cemetery lots were made the units for special tax purposes, the result would be unsatisfactory to all concerned. Some lots would be sold for the tax, and thus diverted to secular uses. Other lots would be saved from sale by the payment of the tax against them. The cemetery, instead of being one consecrated place of burial, or all devoted to business or residence purposes, would be broken up into small fragments used for different and incompatible purposes, rendering the cemetery unfit for the repose of the dead or the
219 activities of the living. It follows that the instruction asked by the plaintiff should have been given, and that those given for the defendant should have been refused.

III.

Fraud in laying out a sewer district is no defense to the collection of the special taxes for the construction of the sewer, unless such fraud is known to the contractor who does the work. Jennings Heights L. & I. Co. vs. City of St. Louis, 165 S. W. Rep. 741, and the cases there cited. The answer in this case does not allege such knowledge on the part of the plaintiff. The defense of fraud is not sufficiently raised by the answer, nor is it shown by the evidence, and therefore, is not in the case.

The judgment is reversed and the cause remanded.

REUBEN F. ROY, *Commissioner.*

Williams, C., concurs.

Per Curiam:

The foregoing opinion of Roy, C. is adopted as the opinion of the Court.

All concur.

220 Which said opinion, in said cause, of the court reported in the 239 Mo. at page 681, is in words and figures as follows, to-wit:

In the Supreme Court of Missouri, Division No. 2, October Term, 1911.

No. 14760.

W. C. MULLINS, Appellant,
vs.
MOUNT SAINT MARY'S CEMETERY ASSOCIATION et al., Respondents.

This action was brought in the circuit court of Jackson County upon two special tax bills in the total sum of $17,598.28, issued to the appellant by the city of Kansas City, in payment for the construction of a sewer. Respondent is an incorporated public cemetery association and owns about thirty-five acres of land in said city, dedicated, used and to be used for cemetery and burial purposes. About ten acres of this land, particularly described in the petition, had not been sold by the respondent and no interments have been made therein. In accordance with the provisions of the charter and ordinances of said city a sewer district was established, embracing the lands benefitted by the construction of the sewer and made liable to assessment for the payment of the cost of the construction thereof. Respondent's cemetery property is situated within the limits of said sewer district. The tax bills in suits were issued against respondent's property as in the case of other real property within the benefited area.

Respondent filed a general demurrer to plaintiff's petition which was sustained by the court, and plaintiff declining to plead further, judgment was rendered against him, from which he appealed to this court.

It is contended by respondent that land used for a public cemetery and for burial purposes is not subject to special taxes assessed to pay for local improvements, such as the sewer for which the tax bills in suit were issued. That contention was upheld by the trial court, and the correctness of that ruling is the decisive question on this appeal.

221 The sewer referred to in the petition was constructed by appellant under the provisions of the city charter, and an ordinance enacted for that purpose. The sections of the charter providing for the payment of the cost of sewers are the following:

"Sec. 10. As soon as the work of constructing * * * any district sewer shall have been completed under a contract let for the purpose, the board of public works shall compute the whole cost thereof, and apportion and charge the same as a special tax against the lots of land in the district, exclusive of the improvements, and in the proportion that their respective areas bear to the area of the whole district, exclusive of the streets, avenues, alleys and public highways, and shall, except as hereinafter provided, make out and certify in favor of the contractor or contractors to be paid, a special tax bill for

the amount of the special tax against each lot in the district."

"Sec. 14. When the City shall own in fee simple absolute any lot or parcel of land, or hold any land not used as a street, avenue, alley or public highway, it shall out of the general fund pay its proper share of the cost of any such work to be paid for in special tax bills as though a private owner of such land, but there shall be no tax bill against any land so owned or held by the city. The board of public works shall ascertain the share for which the city shall be justly liable and the amount to ascertained shall be certified to by the board of public works."

It is provided by section 6, article 10, of the Constitution of this State that: "The property, real and personal, of the State, counties and other municipal corporations, and cemeteries, shall be exempt from taxation." * * * The law is too well established to require the citation of authorities that the exemption from taxation in the foregoing section of the Constitution has reference to general taxes. levied and collected for the support and maintenance of the state, and not to special taxes assessed to pay the cost of local improvements.

The correctness of this proposition is not contested by re-
222 spondent. It rests its claim, that its property is exempt from liability for the taxes sued for, upon a statute hereinafter discussed.

The charter provisions above set forth leave little doubt that the framers of that instrument intended that the whole cost of the improvement should be charged against all the land in the district benefited, exclusive of public thoroughfares, and in the proportion that the respective areas bear to the area of the whole district. That no property within the district was intended to be exempted from liability is made clear by said section 14 of the charter, which provided that when the city owns property in the benefited district it shall pay out of the general fund "its proportionate share of the cost of any such work * * * as though a private owner of said land." And as no lot of land in the district is liable for more than its proportionate part of the total cost, according to its area, it is apparent that if any part of the land included be exempt, then the payment of the corresponding part of the cost of the improvement is entirely unprovided for in the charter. These considerations and the provisions of the charter, by authority of which this improvement was made, plainly indicate that it was not intended or contemplated that respondent's cemetery property should be exempt from the payment of its proportionate part of the cost of the sewer. It follows that the special tax bills in suit must be held to be a valid charge against respondent's land unless the charter provisions under which they were issued are in conflict with the Constitution or a dominant statutory provision. The only provision of the Constitution upon the subject has already been referred to and as it has been construed by the courts not to refer to local assessments, it need not be further considered.

It is settled law that statutes created exemptions from taxes, whether general or special, are strictly construed, and the right of exemption exists only when expressed in explicit terms and must be

established beyond a reasonable doubt. State ex rel. Mt. Mora
223 Cemetery Association vs. Casey, 210 Mo. 235; State ex rel. v. Johnson, 214 Mo. 256; I Cooley on Taxation (3rd) Ed.) 362. An exception is made by the courts to the foregoing rule in the case of strictly public property, but this exception does not extend to such property as cemeteries or burial grounds.

The principle of law applicable in the case of strictly public property is that while it is within the power of the Legislature, in the absence of a constitutional restriction, to make such property liable for the payment of local improvements, and enactment providing for such improvements will not be construed as including public property unless it so provides expressly or by necessary implication. City of Clinton v. Henry County, 115 Mo. 557; St. Louis v. Brown, 155 Mo. 561; Inhabitants v. Mayor, 116 Mass. 193; City of Atlanta v. First Presbyterian Church, 86 Ga. 730. In the case of Clinton v. Henry County, Supra, l. c. 571, the distinction between the two classes of property was recognized by this court in the following language: "That case is authority for the conclusion reached in the first part of this opinion but we do not see that the case goes any further. As to many of the other cases cited by plaintiff, it may be observed that there is a wide difference between property held and used for strictly public uses, as for court house and jail purposes, and property held by corporations organized for private gain, though the property is in a sense devoted to public use, as the property of railroads and cemetery companies. This difference will distinguish many of the cases cited by counsel for the plaintiff from the one now in hand. The property here in question is strictly public property, and on well settled principles of law cannot be held liable for these local improvement assessments until the legislature so says in clear terms or by necessary implication, and that it has not done by the statute relating to cities of the third class." And in the case of City of Atlanta v. First Presbyterian Church, supra, l. c. 736, discussing a statute providing for local improvements, in which
224 no property was expressly exempt from liability for the cost thereof, the court said: "And yet, clear and definite as they are, we can be morally certain that they comprehended more than the legislature intended they should; for they cover by their letter public as well as private property, and subject the whole alike to assessment, lien, levy and sale. That the public property of the United States, the State, the county or the city was intended to be dealt with thus is so improbable that we can have no hesitation in holding that an implied exception as to all public property can and should be engrafted upon the act by construction. And just here the real question in its ultimate form emerges; can a like exception in favor of church property, which all will agree is not public but strictly private property, be recognized, and the words of the statute still further narrowed by construction so as to exclude it also?" The court held that while strictly public property would be excepted from such an enactment by the construction of the courts it would not be so construed as to exempt church property from liability. Section 2181, Revised Statutes of 1909, is as follows:

"All court-houses, jails, clerk's offices and other buildings owned by and county or municipality, and the lots on which they stand, and all burial grounds, shall be exempt from attachment and execution."

Relying upon this section of the law on the subject of executions and exemptions, counsel for respondent maintain that the property of the cemetery is not liable for local assessments. They reason that an assessment for a local improvement is a charge against the property benefitted and can only be enforced by a special execution directed against such property, that, as cemetery property is exempt from execution, the law has provided no means of enforcing the collection of such assessments against cemetery property, from which it follows that such property must be held to be exempt from such liability. We cannot give our assent to this proposition.

225 An examination of said section 2181 and the sections of the same article found in connection therewith, makes it clear that in the enactment of said section special executions against property benefitted for the collection of an assessment for local improvements, are not intended to be included in the exemption therein mentioned. The first section of said article provides that: "The party in whose favor any judgment, order or decree is rendered, may have an execution in conformity therewith." And the next succeeding section: "Such execution shall be a fieri facias against the goods, chattels and real estate of the party against whom the judgment, order or decree is rendered, and shall be to the following effect," etc.

Other sections as to the exemptions of the execution debtor, making it the duty of the clerk of the court to indorse on the execution the debt, damages and costs etc. etc. are equally convincing that section 2181 was not intended to include executions issued against specific property assessed for local improvements.

This question was considered in the case of Bloomington Cemetery Association v. The People, 139 Ill. 16, in which the court, l. c. 20, said: "nor does the fact that this land may be exempt from execution deprive the county court of the power to order it sold for a delinquent special tax. The exemption from execution here meant is exemption from sale on that writ as generally understood—a writ of fi. fa. It is not shown that any part of the land ordered sold has been actually used for burial purposes. This appellant is a private corporation, and its property may be sold like that of any other private owner, unless exempt by its charter. It is unlike a municipal corporation, which can only be compelled to pay a special tax or special assessment by mandamus."

It is provided by sections 5704 and 6711, Revised Statutes of 1909, relating to homesteads, that the homestead "shall be exempt from attachment and execution upon any liability hereafter created." As the language upon which respondent bases its claim of exemption is almost identical with that of the homestead law, then, if respondent's construction should be adopted, it would be practically beyond the power of a municipality to enforce the making of

226 local improvements in the residence portions of the city, for the reason that the homesteads would be exempt from assessment for the payment of the cost thereof. Indeed, the construction contended for by respondent, against the validity of the tax bills in this case, could with equal force and consistency be advanced by a homesteader against an execution even for general taxes, State, county and municipal.

In the case of Clinton v. Henry County, supra, it was sought to collect from the county tax bills for local improvements, issued against the court house square. This court, l. c. 563, said: "The first inquiry is whether the Constitution or statutes exempts this property from such charges." The statutes now relied upon by respondent was then in force and is referred to in the opinion, and as court houses and the lots on which they stand are mentioned along with cemeteries in said section 2181, as being exempt from execution, the fact that this court in holding against the city in that case did not base its decision on the ground that court house property was exempt under said statute, makes it evident that the court did not consider the statute applicable in such cases.

Respondent cites certain New York cases which hold that cemetery property is exempt from liability for local assessments. An examination of these cases, as also of the cases cited by respondent from other states, has convinced us that they do not support respondent's contention. In the case of Buffalo City Cemetery vs. City of Buffalo, 46 N. Y. 506, the court construed a statute which exempted all cemetery property from "all public taxes, rates and assessments," and the court held such property liable for local assessments for the reason that the word public modified the words "rates and assessments," as well as the word "taxes," and therefore that the exemption did not extend to private or local assessments. After the foregoing decision was rendered the general law applicable to cemeteries was amended and the subsequent case of Buffalo Cemetery Association v. City of Buffalo, 118 N. Y. 61, construed the law as amended. This law provided that: "No land actually used and occupied for cemetery purposes shall be sold under execution or for any
227 taxes or assessments." The court held in that case that under the language of that statute cemetery property was exempt from local assessments, and that construction has been adhered to by that court in subsequent cases. Matter of City of New York, 192 N. Y. 459.

The language construed by the court in the latter cases is so different from that of said section 2181 that the decision lends no support to respondent's contention in this case. On the other hand, the former decision, holding that cemetery property was not exempt from assessment for local improvements, and the recognition by the legislature of the necessity of amending the law, as shown by the enactment of a new section expressly providing that no land used for cemetery purposes should be sold under execution or for any taxes or assessments, give support to the contention of appellant that the right to such exemption exists only when it is clearly embraced within the terms of a constitutional or statutory provision granting

the exemption. It should be added that if exemption of cemetery property from sale on execution would give to it immunity from liability for local improvements then there would have been no necessity for adding in the New York statute the words "or for any taxes or assessments."

Other questions have been discussed in the briefs of counsel which, in the view we have taken of the case, we do not deem necessary to decide.

After a careful consideration of the questions so ably presented by counsel for respondent, we are of opinion that the court erred in sustaining the demurrer to the first and second counts of the petition, and accordingly the judgment should be reversed and the cause remanded. It is so ordered

Ferriss, J., and Brown, J., Concur.

JOHN KENNISH, *P. J.*

228 In the Supreme Court of Missouri.

And thereafter, to-wit, on September 23rd, 1916, the following further proceedings were had and entered for record.

19011.

W. C. MULLINS, Respondent,

vs.

MOUNT SAINT MARY'S CEMETERY ASSOCIATION, Appellant.

Now at this day, there are presented by the said Mount Saint Mary's Cemetery Association to Hon. Archelaus M. Woodson, Chief Justice of the Supreme Court of the State — Missouri, in chambers, a petition for a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Missouri, a writ of error from the Supreme Court of the United States to the Suppreme Court of the State of Missouri, an assignment of errors, citation to the respondent (defendant in error), citing and admonishing him to be and appear in the Supreme Court of the United States within thirty days from the date of said citation, and bond in the sum of $10,000.00; which said writ of error is allowed, said assignment of errors ordered filed, said citation signed and ordered issued, and said bond, to operate as a supersedeas, approved and ordered filed.

229 In the Supreme Court of the United States, October Term, 1916.

No. 19011.

MOUNT SAINT MARY'S CEMETERY ASSOCIATION, Plaintiff in Error,

v.

WILLIAM C. MULLINS, Defendant in Error.

Petition for Writ of Error.

To the Honorable Edward Douglass White, Chief Justice of the Supreme Court of the United States, and the Honorable Associate Justices of the Supreme Court of the United States:

The petition of Mount Saint Mary's Cemetery Association respectfully shows that your petitioner is a charitable corporation, organized under the laws of the State of Missouri, having its principal place of business in Kansas City, Missouri; that, on or about the 24th day of July, 1907, William C. Mullins, the above named defendant in error, (being designated in the petition as W. C. Mullins) filed a suit in the Circuit Court of Jackson County, Missouri, at Kansas City, against your petitioner and the First National Bank of Kansas City, Missouri, for the purpose of enforcing the respective liens of two special tax bills issued by Kansas City, Missouri, against the following described tract of land, towit:

Part of the S. E. ¼ of the N. E. ¼ of Section 10, Township 49, Range 33, more particularly described as follows: Beginning at a point on the north line of said quarter quarter section 375 feet east of the northwest corner thereof; thence south 405 feet; thence
230 west 355 feet; thence south and parallel with the west line of said quarter quarter to south line thereof; thence east along said south line to the west line of Jackson Avenue; thence north along the west line of Jackson Avenue to the north line of said quarter quarter; thence west to beginning, all in Kansas City, Jackson County, Missouri.

That both special tax bills were issued for the construction of district sewers in sewer district number 218, in Kansas City, Missouri; that the bill set out in the first count was issued October 12, 1904, for $17,598.28, payable in four installments; and the tax bill set out in the second count of the petition was issued September 1, 1905, for $1,531.71.

That, among other defenses set up by your petitioner was the allegation that your petitioner was denied the equal protection of the law, such claim was made in the answer of your petitioner, as follows:

"Further answering, defendant alleges that at the time of the issuance of the tax bills described in plaintiff's petition to the plaintiff, approximately the east half of the land owned by defendant was actually used and occupied for burial purposes; that the plats and records in the office of the Recorder of Deeds of Jackson County, in Kansas City, and the actual occupation of the land, showed that

said land was occupied for cemetery purposes, and by actual occupation showed that in approximately one-half of the land the defendant had no beneficial interest, but that the same had passed to various grantees; and defendant alleges that, while it had a superintending control over said land and possible rights of reversion therein, its beneficial interest had passed to various grantees in the part of the land at that time actually used and occupied for burial purposes; that said facts were known to the officers of the city and to the city, and that the officers of said city had no right or authority to issue a single tax bill, including therein not only the property of which the defendant had the absolute title, but also the property in which defendant had ceased to have any beneficial interest. Defendant alleges that the effect of including all the property in one special tax bill was to double the burden upon the property in which the defendant has the full title and compel this property to remove all burden from the remainder of said ground, in which the defendant has no ben-
231 eficial interest and the care of which constitutes a liability against this defendant. Defendant further alleges that if any assessment could be made at all against the land of defendant, that the apportionment should have been made in two special tax bills, so that the land of which defendant still retains control might have to pay for only the proportional part of the cost of the sewer assessed against said land; that the issue of said tax bill against the whole of said land to a single tract constitutes a denial to this defendant of the equal protection of the law, and is a violation of the Fourteenth Amendment of the Constitution of the United States."

And that your petitioner also pleaded that the enforcement of said special tax bills against the property described amounted to the taking of the property of your petitioner, without due process of law. Said claim was set up in the answer as follows:

"Defendant alleges that subsequent to the establishment of said sewer district, and prior to the passage of the ordinance providing for the construction of the district sewer for which the tax bill described in the first count of plaintiff's petition was issued, the Common Council provided for building a joint district sewer by Ordinance No. 18157, under which ordinance and the contract thereunder awarded, a special tax bill was issued against the said land of defendant, amounting to $1,611.15, on the 28th day of November, 1902; and that by Ordinance No. —, a district sewer had been constructed in said sewer district No. 218, under which a special tax bill was issued, amounting to $9,104.30, said bill being issued under Ordinance No. — approved —— —, ——, and said tax bill being issued December 19, 1903. Defendant alleges that the passage of Ordinance No. 24197, under which the tax bill described in the first count of plaintiff's petition was issued, was, as to this defendant's property, an unreasonable exercise of the powers conferred upon the Common Council by the charter of Kansas City, and that said ordinance is therefore void. Defendant alleges that by reason of the facts above set forth, no possible or potential benefits could be received by the defendant from the construction of said sewer; that no notice or hearing was given to the defendant either of the proceedings for

the construction of said sewer or for the establishment of said sewer district, and that the imposition of a special assessment against the property of the defendant under facts which render it impossible that defendant's property should receive any benefit from said work amounts to taking the property of the defendant without due process of law, and is in violation of Section 30, Article II, of the Constitution of the State of Missouri, and of the Fourteenth Amendment to the Constitution of the United States; and defendant alleges that of all of said facts the plaintiff had notice and that in his bidding for said work he added to the estimated cost of said work the estimated amount of the tax bill to be issued against the property of this defendant."

232 Such claims of your petitioner were again presented by declarations of law, asked by it, at the close of the evidence in the case. The declarations were refused and are as follows:

"Declaration of Law D 2. The court declares the law to be that if the court finds from the evidence that at the time of the issue of the special tax bills upon which this suit was brought, approximately one-half of the area of the land described in said special tax bills had been sold and was actually used and occupied for the purpose of the burial of the dead, and that said use and occupation was visible and open, and that in only one-half of the area of said land the defendant had any substantial beneficial interest, then the enforcement of the whole amount of each of the special tax bills in suit, as a gross amount, against all the land described in said tax bills, would be a taking of the property of the defendant without due process of law, in violation of the provisions of Section 30, Article 2, of the Constitution of Missouri, and of Section 1, of the Fourteenth Amendment of the Constitution of the United States, and said tax bills are therefore void; and said enforcement would further be in violation of Sec. 1 of the Fourteenth Amendment of the Constitution of the United States, in that it denies to this defendant the equal protection of the laws. ('Refused.')"

"Declaration of Law D 3. The court declares the law to be that if the court finds the facts as set out in declaration of law No. 2, asked by the defendant, and further finds that no notice was given of the proposed enactment of the ordinances for establishing said sewer district No. 218, nor of the ordinances providing for the construction of said sewers, nor any opportunity for a hearing on any of said matters; then as to the interest of the defendant in the land described in said tax bills said ordinances are void and the enforcement of the same would be a taking of the property of this defendant without due process of law, in violation of Section 30, Art. 2, Constitution of Missouri, and Section 1, of the Fourteenth Amendment of the Constitution of the United States. ('Refused.')"

That your petitioner duly excepted to the refusal of the trial court to give said declarations of law.

On the 4th day of May, 1915, the court rendered judgment in said suit in favor of the plaintiff, on the first count in the petition, in the sum of $36,135.65, and, on the second count in the petition, in the sum of $3,012.59, and for its enforcement by a sale of said land.

That your petitioner renewed the said objections in the
233 motion for a new trial, duly filed in the trial court, in the following language:

"Seventh. Because the finding and judgment of the court amounted to the taking of the property of this defendant without due process of law, in violation of Section 30, of Article 2, of the Constitution of Missouri, and Section 1, the Fourteenth Amendment of the Constitution of the United States.

Eighth. Because the finding and judgment of the court deny to this defendant the equal protection of the law, in violation of the Fourteenth Amendment of the Constitution of the United States."

That your petitioner duly excepted to the overruling of its said motion for a new trial.

That said cause was duly appealed to the Supreme Court of the State of Missouri, and that the same questions claiming the protection of the Constitution of the United States were raised in the Supreme Court.

Your petitioner further alleges that by the charter of Kansas City, Missouri, authority was given to construct district sewers and to assess the cost thereof against private property, by Section 10, Article 9 (page 147 printed charter):

"Sec. 10. District Sewers—Change of District—Construction and Material of—Cost—Apportionment—Tax Bills.—District sewers shall be constructed within the limits of the districts heretofore or hereafter established by ordinance, as each case may be. Any sewer district heretofore or hereafter established may be subdivided, enlarged or changed by ordinance at any time previous to the construction of any district sewer therein. But no such district shall be subdivided, enlarged or changed after a district sewer shall have been constructed therein. The city may, with the approval of the board of public works, from time to time, cause a district sewer or sewers to be constructed in any sewer district heretofore or hereafter established whenever the common council may deem such sewer necessary for sanitary or other purposes, and such sewer or sewers shall be of such dimensions, material and character as shall be prescribed by ordinance, and any district sewer heretofore or hereafter constructed may be changed, diminished, enlarged or extended, and shall have all the necessary laterals, inlets and other appurtenances which may be required. As soon as the work of construction, changing, diminishing, enlarging or extending any district sewer shall have been completed under a contract let for that purpose, the board of public
works shall compute the whole cost thereof, and apportion
234 and charge the same as a special tax against the lots of land in the district, exclusive of the improvements, and in the proportion that their respective areas bear to the area of the whole district, exclusive of the streets, avenues, alleys and public highways, and shall, except as hereinafter provided, make out and certify in favor of the contractor or contractors to be paid, a special tax bill for the amount of the special tax against each lot in the district. The city shall in no event nor in any manner whatever be liable for or

on account of the cost of work done in constructing, changing, diminishing, enlarging or extending any district sewer, except as hereinafter provided."

That in the enforcement of the lien, authorized by the charter, by suit, the charter of Kansas City, then in force, provided as follows:

"In a suit on any special tax bill, the judgment shall be special that the plaintiff shall recover the amount found due, including interest, together with costs to be levied and made off the land described in the tax bill, and a special execution shall issue to sell the land to pay any such judgment, interest and costs. The judgment, exclusive of costs, shall bear interest at the same rate as the tax bill." (Sec. 18. Art. 9. charter of Kansas City, pp. 154, 155.)

That the land against which said special tax bills were issued was acquired by your petitioner about 1877, and the undisputed evidence shows that prior to October 12, 1904, the date of the issue of the earlier tax bill, practically one-half of the land described in said special tax bills had been sold by your petitioner and was actually used and occupied for purposes of burial; that some of the land so sold had been conveyed by deed and some of the land by perpetual licenses for burial purposes, and that many of such deeds and licenses were of record in the office of the Recorder of Deeds of Jackson County, Missouri; also that a plat of the portion of said land used for burial purposes was of record in the office of said Recorder of Deeds, long prior to the issue of said tax bills.

Your petitioner further alleges that the undisputed evidence in said case was to the effect, that the portion of land already sold and occupied for burial purposes had practically no market value,
235 and that the effect of the judgment in this case is to compel the land, still owned by your petitioner in error, to pay the full amount of said judgment, while the amount of the special tax bills and the respective judgments was determined by computing the area of the land sold by your petitioner, as well as the area of the land still owned and controlled by it.

Your petitioner alleges that, under these provisions of the law and similar provisions relating to other cities, it had been the consistent ruling of the Supreme Court of the State of Missouri that each lot or parcel of land must be assessed separately, in order that the land owner might pay off the separate assessment against the separate tracts, and your petitioner alleges that the act of the city of Kansas City, Missouri, in issuing said special tax bills, and the judgment of the court enforcing the liens thereof for the whole amount of said respective bills, and ordering a sale of all the land described therein, was a denial to your petitioner of the equal protection of the law, in this, that a uniform rule of law, applied to all other persons and corporations, was denied your petitioner, and that, under the laws of the State of Missouri, in no other case, has any owner of land had his land assessed for an amount partly determined by the area of land which he had already sold, all in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

Your petitioner further shows that said judgment and the enforcement thereof would operate against your petitioner as a deprivation

of its property, without due process of law, in that your petitioner would be compelled by the sale of its land to pay for the amount of an assessment against land which had been sold by your petitioner to other persons, prior to the issue of said tax bills.

236 Your petitioner alleges that said questions were duly raised upon the appeal to the Supreme Court of said state, where the case was heard in division No. 2 of said court, being case No. 19011 on the docket of said court, on which appeal your petitioner asked a reversal of said judgment, but that said court affirmed said judgment, on the 5th day of July, 1916.

And your petitioner further shows that, in accordance with the Constitution and laws of the State of Missouri, it duly filed a motion for a re-hearing of said case, raising again its rights under the Constitution of the United States, and that said motion was overruled by said court.

Your petitioner further shows that, in accordance with the Constitution of the State of Missouri, it filed a motion in said Division No. 2 of the Supreme Court of Missouri to transfer said case to the court en banc, upon the ground that a federal question was involved, and, in its motion, set out its grounds for the same, which motion was overruled by said division No. 2 of the Supreme Court of Missouri, on the 18th day of July, 1916, and the judgment herein referred to became final in said court.

And your petitioner further shows that the decisions of said courts and the judges thereof, and each of them, denied to your petitioner a title, right, privilege and immunity held by your petitioner under the Constitution of the United States.

And your petitioner alleges that in the trial court the First National Bank of Kansas City, Missouri, one of the defendants above named, as shown by the record, although having answered in the suit, failed to appear at the trial, and judgment was rendered

237 against said defendant and your petitioner alleges that it has given notice in writing to said defendant, the First National Bank of Kansas City, Missouri, requesting it to join in the application for a writ of error herein, and that said defendant acknowledged the receipt of a copy of said notice, but refuses to join in such application, as appears by the written notice hereto attached, together with the acknowledgment of the receipt of the same and a refusal to join in the application for a writ of error, which are made a part of this petition.

Wherefore, your petitioner prays that a writ of error may issue and that it may be allowed to bring up for review before the Supreme Court of the United States said order and judgment of the said Supreme Court of the State of Missouri; and that your petitioner may have such other and further relief in the premises as may be just. And your petitioner will forever pray.

HENRY L. McCUNE,
CLARENCE S. PALMER,
WILLIAM MOORE,
Attorneys for Plaintiff in Error.

238 STATE OF MISSOURI,
County of Jackson, ss:

John E. Ahe-rn, being duly sworn, says that he is the Secretary of Mount Saint Mary's Cemetery Association, the petitioner herein, and makes this affidavit on its behalf, and that the facts set forth in the foregoing petition are true, according to his best knowledge and belief.

JOHN E. AHEARN.

Subscribed and sworn to before me this 19th day of September, 1916.

[Seal James A. Spellman, Notary Public, Jackson County, Mo.]

JAMES A. SPELLMAN,
Notary Public Jackson County, Missouri.

My commission expires 2d day of August, 1917.

Read on application for allowance of writ of error, September —, 1916.

Allowed September —, 1916.

——— ———,
Chief Justice of the Supreme Court of the State of Missouri.

239 In the Circuit Court of Jackson County, Missouri, at Kansas City.

No. 19011, in Supreme Court of Missouri.

No. 33917.

W. C. MULLINS, Plaintiff,
vs.
MOUNT SAINT MARY'S CEMETERY ASSOCIATION and THE FIRST NATIONAL BANK OF KANSAS CITY, MISSOURI, Defendants.

To the First National Bank of Kansas City, Mo.

Please take notice that Mount Saint Mary's Cemetery Association, one of the defendants above named is about to apply to the Chief Justice of the State of Missouri, to allow a writ of error from the Supreme Court of the United States to review the order and judgment of the Supreme Court of the State of Missouri affirming the judgment of the said Circuit Court of Jackson County, and that it hereby demands and requests and notifies you to join in the application for such writ of error.

Dated, Kansas City, Missouri, September, 14, 1916.

MOUNT SAINT MARY'S CEMETERY ASSOCIATION,
By HENRY L. McCUNE,
WILLIAM MOORE AND
CLARENCE S. PALMER,
Its Attorneys.

Now comes the First National Bank of Kansas City, Missouri, and acknowledges the receipt of a copy of the above notice and refuses to join in the application for such writ of error.

Dated, Kansas City, Missouri, September, 15, 1916.

FIRST NATIONAL BANK OF KANSAS CITY, MO.,
By BALL & RYLAND,
Its Att'ys.

240 Prayer for Reversal.

No. 19011.

MOUNT SAINT MARY'S CEMETERY ASSOCIATION, Plaintiff in Error,
v.
WILLIAM C. MULLINS, Defendant in Error.

To the Honorable the Supreme Court of the United States:

And now comes Mount Saint Mary's Cemetery Association, the plaintiff in error, and prays for a reversal of the judgment of the Supreme Court of the State of Missouri, in the action brought by William C. Mullins (in the name of W. C. Mullins), plaintiff and respondent, against Mount Saint Mary's Cemetery Association, defendant and appellant, who was impleaded with the First National Bank of Kansas City, Missouri, who made default, which judgment of the Supreme Court was rendered on or about July 5, 1916, and the motion for a re-hearing of said cause, and also a motion to transfer said cause to the court en banc, were overruled on July 18, 1916; and it also prays for a reversal of the judgment in said action in the Circuit Court of Jackson County, Missouri, at Kansas City, rendered on the 4th day of May, 1915.

HENRY L. McCUNE,
CLARENCE S. PALMER,
WILLIAM MOORE,
Attorneys for Mount Saint Mary's Cemetery Association.

241 In the Supreme Court of the United States, October Term, 1916.

No. 19011.

MOUNT SAINT MARY'S CEMETERY ASSOCIATION, Plaintiff in Error,
v.
WILLIAM C. MULLINS, Defendant in Error.

Assignment of Errors.

I.

Now comes Mount Saint Mary's Cemetery Association, plaintiff in error, and makes and files this, its assignment of errors, as follows:

The Supreme Court of Missouri erred in holding and deciding that, under the charter of Kansas City, one special tax bill for the construction of sewers could be issued against land owned by the plaintiff in error, including land already sold by plaintiff in error with the land still owned by it, and where the amount of the special tax bill was determined by the combined area of the land already sold and the land unsold; and that said decision of the Supreme Court of Missouri denied to plaintiff in error a title, right, privilege and immunity held by the plaintiff in error, under the Constitution and Statutes of the United States; and that the Supreme Court of the State of Missouri decided against such right, title, privilege and immunity, to the manifest injury of the plaintiff in error herein.

II.

The Supreme Court of the State of Missouri erred in holding and deciding that the plaintiff in error still owned, for purposes
242 of special taxation the land which it had already sold, and for which it had given deeds or perpetual licenses for burial purposes; and that said decision of the Supreme Court of the State of Missouri denied to plaintiff in error a title, right privilege and immunity held by the plaintiff in error, under the Constituton and Statutes of the United States; and that the Supreme Court of the State of Missouri decided against such right, title, privilege and immunity, to the manifest injury of the plaintiff in error herein.

III.

That the trial court erred in refusing Declaration of Law No. 2, asked by plaintiff in error (defendant in the trial court), which reads as follows:

"Declaration of Law. D. 2.

The court declares the law to be that if the court finds from the evidence that at the time of the issue of the special tax bills upon which this suit was brought, approximately one-half of the area of the land described in said special tax bills had been sold and was actually used and occupied for the purpose of the burial of the dead, and that said use and occupation was visible and open, and that in only one-half of the area of said land the defendant had any substantial beneficial interest, then the enforcement of the whole amount of each of the special tax bills in suit, as a gross amount, against all the land described in said tax bills, would be a taking of the property of the defendant without due process of law, in violation of the provisions of Section 30, Article 2, of the Constitution of Missouri, and of Section 1, of the Fourteenth Amendment of the Constitution of the United States, and said tax bills are therefore void; and said enforcement would further be in violation of Sec. 1 of the Fourteenth Amendment of the Constitution of the United States, in that it denies to this defendant the equal protection of the laws."

('Refused.')

And that, in refusing said Declaration of Law the trial court de-

nied to plaintiff in error a right, title, privilege and immunity given it by the Fourteenth Amendment to the Constitution of the United States, in that it denied it due process of law and denied it
243 the equal protection of the laws, and this without any fault or negligence on its part, but wholly by the default of Kansas City in not complying with the terms of Section Ten, Article 9 of the Charter of Kansas City, Missouri, then in force; and that said right, title, privilege and immunity was claimed by this plaintiff in error in the Supreme Court of the State of Missouri, and the decision of the said Supreme Court was against such right, title, privilege and immunity, after said right, title, privilege and immunity had been claimed in the trial court and denied by said trial court; and the Supreme Court of the State of Missouri affirmed the judgment against the plaintiff in error, notwithstanding such error of the trial court, and denied to plaintiff in error due process of law and equal protection of the laws, guaranteed it by the Fourteenth Amendment of the Constitution of the United States.

IV.

The trial court erred in refusing to give Declaration of Law No. 3, asked by the plaintiff in error (defendant in the trial court), which reads as follows:

"Declaration of Law, D. 3.

The court declares the law to be that if the court finds the facts as set out in declaration of law No. 2, asked by the defendant, and further finds that no notice was given of the proposed enactment of the ordinances for establishing said sewer district No. 218, nor of the ordinances providing for the construction of said sewers, nor any opportunity for a hearing on any of said matters; then as to the interest of the defendant in the land described in said tax bills said ordinances are void and the enforcement of the same would be a taking of the property of this defendant without due process of law, in violation of Section 30, Art. 2, Constitution of Missouri, and Section 1 of the Fourteenth Amendment of the Constitution of the United States." ('Refused.')

And, in denying the right claimed in such Declaration of Law, the trial court denied to plaintiff in error a right, title, privi-
244 lege and immunity given it by the Fourteenth Amendment of the Constitution of the United States, in that it denied it due process of law, and this without any fault or negligence on its part; and that said right, title, privilege and immunity was claimed by this plaintiff in error in the Supreme Court of the State of Missouri, and the decision of the said Supreme Court was against such right, title, privilege and immunity, after said right, title, privilege and immunity had been claimed in the trial court and denied by said trial court; and the Supreme Court of the State of Missouri denied plaintiff in error due process of law guaranteed it by the Fourteenth Amendment of the Constitution of the United States.

V.

The Supreme Court of the State of Missouri, by its judgment, and the judgment of the trial court has deprived the plaintiff in error of its property, without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States, and also denied to plaintiff in error the equal protection of the laws, in violation of the said Fourteenth Amendment of the Constitution of the United States.

Wherefore, plaintiff in error asks, by reason of each and every one of the foregoing assignments of error, that the judgment and decision of the Supreme Court of the State of Missouri, in the above entitled cause, be reversed and for naught held, and that the plaintiff in error have and recover of the defendant in error all costs herein expended.

HENRY L. McCUNE,
CLARENCE S. PALMER,
WILLIAM MOORE,
Attorneys for Plaintiff in Error.

245 Read on application for allowance of writ of error, September 23d, 1916.

Allowed September 23d, 1916.

A. M. WOODSON,
Chief Justice of the Supreme Court of the State of Missouri.

245½ [Endorsed:] No. 19011. In the Supreme Court of the State of Missouri. Mount Saint Mary's Cemetery Association, Plaintiff in Error, v. William C. Mullins, Defendant in Error. Petition for writ of error, assignment of errors, prayer for reversal, and refusal of co-defendant to join in writ of error. Filed Sept. 23, 1916. J. D. Allen, Clerk. Henry L. McCune, Clarence S. Palmer, William Moore, Attorneys for Plaintiff.

246 In the Supreme Court of the United States, October Term, 1916.

No. 19011.

MOUNT SAINT MARY'S CEMETERY ASSOCIATION, Plaintiff in Error,
v.
WILLIAM C. MULLINS, Defendant in Error.

Citation.

To William C. Mullins, Greeting:

You are hereby cited and admonished to be and appear, at the Supreme Court of the United States, at Washington, within thirty days from date hereof, pursuant to a writ of error filed with the Clerk

of the Supreme Court of Missouri, wherein Mount Saint Mary's Cemetery Association is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward Douglass White, Chief Justice of the United States, this 23d day of September, in the year of our Lord one thousand, nine hundred and sixteen.

A. M. WOODSON,
Chief Justice of the Supreme Court of the State of Missouri.

Return on other side.

246½ STATE OF MISSOURI,
County of Jackson, ss:

William Moore, being first duly sworn on oath states that he served the within citation to the defendant in error, William C. Mullins, by delivering an exact copy of the within citation to Mathew A. Fye, Esq., and another exact copy of the same to E. L. Snider, Esq., both of whom are attorneys of record for the said defendant in error, on the Twenty Fifth 25th day of September, 1916, at Kansas City, Jackson County, Missouri.

WILLIAM MOORE.

Subscribed and sworn to before me this 25th day of September, 1916.

[Seal Jacob E. Fair, Notary Public, Jackson County, Mo.]

JACOB E. FAIR,
Notary Public, Jackson County, Missouri.

My Commission as Notary Public expires December 27, 1919.

247 [Endorsed:] 19011. In the Supreme Court of Missouri. Mount Saint Mary's Cemetery Association, Plaintiff in Error, vs. William C. Mullins, Defendant in Error. Citation to Defendant in Error. Filed Sept. 26, 1916. J. D. Allen, Clerk. Henry L. McCune, C. S. Palmer, William Moore, Attorneys for Plaintiff in Error.

248 In the Supreme Court of Missouri.

No. 19011.

MOUNT SAINT MARY'S CEMETERY ASSOCIATION, Plaintiff in Error,
vs.
WILLIAM C. MULLINS, Defendant in Error.

In Error from the Supreme Court of the United States to Supreme Court of Missouri.

Order.

Having read and considered the petition for a Writ of Error and the Assignment of Error, and it being made to appear by the notice in writing to the First National Bank of Kansas City, Missouri, and the acknowledgment of service thereof by said First National Bank, and its written refusal to join in the application for the writ of error, that such notice had been duly given and that said First National Bank has refused to join in said application, it is hereby ordered that said writ of error be allowed to the Plaintiff in error, Mount Saint Mary's Cemetery Association, alone, and that said writ shall issue and the amount of the bond is fixed at the sum of Ten $10,000.00 Thousand Dollars; said bond to act as a supersedeas. Dated September 23d. 1916.

A. M. WOODSON,
Chief Justice of the Supreme Court of Missouri.

248½ [Endorsed:] 19011. In the Supreme Court of Missouri. Mount Saint Mary's Cemetery Association, Plaintiff in Error, vs. William C. Mullins, Defendant in Error. Order Allowing Writ of Error and Fixing Bond in Error from Supreme Court of the United States to the Supreme Court of Missouri. Filed Sep. 23, 1916. J. D. Allen, Clerk. Henry L. McCune, Clarence S. Palmer, William Moore, Att'ys for Plaintiff in Error.

249 In the Supreme Court of the United States, October Term, 1916.

No. 19011.

MOUNT SAINT MARY'S CEMETERY ASSOCIATION, Plaintiff in Error,
v.
WILLIAM C. MULLINS, Defendant in Error.

Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Missouri, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said Supreme Court of

Missouri before you, being the highest court of law or equity of the said state in which a decision could be had, in the said suit between William C. Mullins (named in the record W. C. Mullins), respondent, and Mount Saint Mary's Cemetery Association, appellant, whereby was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said state, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision was in favor of their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was
250 against the title, right, privilege, or exemption, specially set up or claimed, under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened, to the great damage of the said Mount Saint Mary's Cemetery Association, as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this Writ, so that you have the same at Washington, on the 23d day of October next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, which of right and according to the laws and customs of the United States, should be done.

Witness, the Honorable Edward Douglass White, Chief Justice of the said Supreme Court, the 23d day of September, in the year of our Lord one thousand, nine hundred and sixteen.

[Seal of the United States District Court of Missouri, Western Division, Western District.]

JOHN B. WARNER, *Clerk*,
By H. C. SPAULDING, *Deputy*.

Allowed September 23d, 1916.

A. M. WOODSON,
Chief Justice of the Supreme Court of Missouri.

250½ [Endorsed:] No. 19011. In the Supreme Court of Missouri, Division Number Two. Mount Saint Mary's Cemetery Association, Plaintiff in Error, vs. William C. Mullins, Defendant in Error. Writ of Error to Supreme Court of Missouri from Supreme Court of the United States. Filed Sep. 23, 1916. J. D. Allen, Clerk. H. L. McCune, C. S. Palmer, William Moore, Att'ys for Plaintiff in Error.

251 In the Supreme Court of the State of Missouri.

No. 19011.

W. C. MULLINS, Respondent,

vs.

MOUNT SAINT MARY'S CEMETERY ASSOCIATION, Appellant.

Bond for Prosecution of Writ of Error to the Supreme Court of the United States.

Know All Men by These Presents:

That we, Mount Saint Mary's Cemetery Association, and Massachusetts Bonding and Insurance Company, a corporation of the Commonwealth of Massachusetts, of Boston, are held and firmly bound unto the above named W. C. Mullins (whose full name is William C. Mullins) in the sum of Ten Thousand Dollars ($10,000.00) to be paid to the said W. C. Mullins, for the payment of which, well and truly to be made, we bind ourselves, and each of us, and each of our successors, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 21st day of September, in the year of our Lord One Thousand Nine Hundred and Sixteen.

Whereas, the above named Mount Saint Mary's Cemetery Association has prosecuted a writ of error from the Supreme Court of the United States to the Supreme Court of Missouri, to reverse a judgment and decree rendered by the Judges of the Supreme Court of the State of Missouri, in the above entitled cause:

Now Therefore, the condition of this obligation is such that, if the above named Mount Saint Mary's Cemetery Association shall prosecute said writ of error to effect and answer all damages and costs, if it fail to make said writ of error good, then this obligation shall be void, otherwise, the same shall be and remain in full force and effect.

252 [SEAL.] MOUNT SAINT MARY'S CEMETERY ASSOCIATION,
By JOHN P. LYNCH, *Vice-Pres.*

Attest:
JOHN E. AHERN,
Secretary.

[SEAL.] MASSACHUSETTS BONDING AND INSURANCE COMPANY,
By D. A. MURPHY, *Attorney-in-fact.*

Attest:
BERT L. GRUHIN,
Attorney-in-fact.

This bond is approved as to sufficiency and form and to act as a supersedeas, September 23rd, 1916.

A. M. WOODSON,
Chief Justice of the Supreme Court of the State of Missouri.

253 In the Supreme Court of Missouri.

MOUNT SAINT MARY'S CEMETERY ASSOCIATION, Plaintiff in Error,
vs.
WILLIAM C. MULLINS, Defendant in Error.

Clerk's Certificate.

STATE OF MISSOURI, *sct:*

I, J. D. Allen, Clerk of the Supreme Court of the State of Missouri, certify that the above and foregoing form a full, true and correct copy of all records and proceedings, in the above entitled cause, as called for in the Præcipe for Transcript filed herein, as the same appear of record or on file in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the Supreme Court of Missouri, at my office in the City of Jefferson, State aforesaid, this 16th day of October, 1916.

[Seal of the Supreme Court of Missouri.]

J. D. ALLEN,
Clerk of the Supreme Court of the State of Missouri.

Endorsed on cover: File No. 25,580. Missouri Supreme Court. Term No. 750. Mount Saint Mary's Cemetery Association, plaintiff in error, vs. William C. Mullins. Filed October 27th, 1916. File No. 25,580.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1917.

MOUNT SAINT MARY'S CEMETERY ASSOCIATION,

Plaintiff in Error,

v. No. [redacted]

WILLIAM C. MULLINS,

Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

FILE NUMBER 25630.

Brief for Plaintiff in Error.

FRANCIS G. DOWNING,
HENRY L. McCUNE,
WILLIAM MOORE,
CLARENCE S. PALMER,
Attorneys for Plaintiff in Error.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1917.

MOUNT SAINT MARY'S CEMETERY ASSOCIATION,

Plaintiff in Error,

v. No. 304

WILLIAM C. MULLINS,

Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

FILE NUMBER 25580.

Brief for Plaintiff in Error.

STATEMENT OF THE CASE.

THE FEDERAL QUESTION.

The original suit is an action at law brought in the Circuit Court of Jackson County, Missouri, by defendant in error, as plaintiff, to enforce the liens of two special tax bills issued by Kansas City, Missouri, in part payment of

the cost of two district sewers, constructed in sewer district No. 218, in said city.

Plaintiff in error, defendant in the original suit, is a charitable corporation, organized under the laws of Missouri solely for the purpose of acquiring and maintaining a cemetery, subdividing it into lots, and selling, disposing of, and managing the same. The net receipts of the corporation, after providing for operating expenses and a maintenance fund, are to be applied to the support of Catholic Orphan Asylums.

The first tax bill on which this suit was brought was issued October 12, 1904, for $17,598.28, and the other tax bill was issued September 1, 1905, for $1,531.71. The same tract of land is described in both tax bills and consists of about 34 acres. The land is the land comprising Mount Saint Mary's Cemetery, and, except for the lots sold for burial purposes, is owned by plaintiff in error.

Twenty-five years prior to the time of the issue of the first tax bill, the land had been subdivided into cemetery lots, with walks and drives. The plat, showing the subdivision of part of the land, had been filed in the office of the Recorder of Deeds of Jackson County, Missouri, January 15, 1878. The plat of the remainder of the land was not filed, but was kept in the office of the Secretary of the Association, and lots were located with reference to it. The red line in the map in the record p. 96, shows the boundary between the sold and occupied land and the unsold land in 1904 (Rec., 64.)

Prior to the issue of the first tax bill, the plaintiff in error had sold approximately one-half of the land described in the special tax bills for burial purposes.

Prior to about 1898 the rights of purchasers of lots were specified in an instrument in the form of a deed, a copy of which is as follows:

"This Deed, made and entered into this eighth day of November in the year of our Lord One Thousand Eight Hundred and Eighty-five by and between the Mount St. Mary's Cemetery Association, under the laws of the State of Missouri, duly organized and incorporated as a body corporate and politic, of the City of Kansas City and County of Jackson, in said State of Missouri, party of the first part, and Patrick O'Rourke, of the City of Kansas, County of Jackson, Missouri, party of the second part.

Witnesseth. That the said party of the first part, for and in consideration of the sum of $70.00 Seventy Dollars to it in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, does subject to the regulations and stipulations hereinafter mentioned, grant bargain and sell unto the said party of the second part a certain lot or piece of ground, situated in Mount St. Mary's Cemetery, on the road to Independence, County of Jackson, a plat of which is filed in the office of the Recorder of Deeds, for said County of Jackson, in Section B. of said Cemetery, and a plat of subdivision of which said section will also be filed in the office of the Recorder of Deeds as soon as said Section B. shall be fully subdivided. the lot hereby conveyed being numbered 309 East Fraction, Block 12, Section B. on the plat of said Section, to be filed as aforesaid; which said Lot contains Three Hundred and Forty square feet.

To have and to hold the same unto the said party of the second part, his heirs and assigns only as a place of burial, subject, however, to the condition, stipulations and regulations hereto annexed and made part of this deed and which are the conditions upon which this deed is made.

And the said party of the first part covenants for itself, its successors and assigns that it shall and will upon the faithful compliance by said party of the second part, his heirs, executors, administrators and assigns, of the said stipulations and regulations, warrant and defend the title to the premises to him and them, the said party of the second part, his heirs, executors, administrators and assigns, against the lawful claims and demands of all persons whatsoever.

In Witness Whereof, the said party of the first part has caused these presents to be executed under the seal and signature of Thomas Corrigan, its President, hereto affixed, and the same being further attested under the signature of..... its Secretary, and attested under the Seal of the corporation, all done the day and year hereinabove written.

(Signed) THOMAS CORRIGAN, (Seal)
President.

Attest:
JNO. E. AHERN. (Seal)"

This instrument has the regular granting clause of a warranty deed under the Missouri statute, but contains the provision that the grant is made only as a place of burial and subject to conditions annexed and made a part of the deed. These conditions are those usual in cemetery deeds, to prevent any incongruous structures and to preserve the proprieties as established by the Catholic Church. No right of reversion is reserved in these deeds. As a rule these deeds were regularly recorded in the office of the Recorder of Deeds.

After about 1898 the rights of purchasers of lots was evidenced by a perpetual license for burial purposes forever, in the following form:

"This is to certify that John Raferty paid to the Mount St. Mary's Cemetery Association the sum of $..... on account of W. half N. half, 10 by 10, Lot 18, in Block 5 in Section P in Mount St. Mary's Cemetery, situate in the County of Jackson and State of Missouri as said lot is marked and designated on the recorded plat of said Mount St. Mary's Cemetery, filed in the Recorder's Office within and for said County, and which entitles the said John Raferty to the exclusive use of said lot or part of lot for the interment of members of his family forever, subject, however, to such by-laws,

rules and regulations as are now in force or may hereafter be adopted by said association.

In testimony whereof the undersigned President and Secretary of said association have hereunto subscribed their names and affixed the seal of said corporation at the office of said association in Kansas City, Missouri, this November 5, 1901.

(L.S.) BERNARD CORRIGAN, *President.*
C. M. CONLON, *Secretary.*"

Under the city charter, the cost of district sewers was assessed against the land in the sewer district, exclusive of streets and alleys, in proportion to the area of the respective lots or tracts of land to the whole area of the sewer district.

The amounts of the respective tax bills in suit were determined by the area of the whole 34 acres of land, not by the 17 acres still owned by the plaintiff in error. The result is that, in order to prevent the sale of the land which the plaintiff in error now owns, it must pay the amount which would have been assessed against this tract and also the amount assessed on account of the 17 acres which it had sold and which was used for burial purposes, prior to the issue of the first tax bill.

Under the interpretation heretofore given to the Missouri laws providing for special assessments, by the Supreme Court of Missouri, it has been held that each lot or tract of land must be assessed separately. This was a rule even where one party owned all the tracts assessed. It is, therefore, our claim that the judgment of the Circuit Court and the Supreme Court, in affirming this judgment, denies to plaintiff in error the equal protection of the laws, in that it applies to plaintiff in error a rule not applied to any other litigant. We also claim that, inasmuch as this judgment compels plaintiff in error to pay the amount added to this judgment by reason of computing the area of land, not owned by it at

the time of the issue of the bills, it takes our property to pay the indebtedness of another, and thus takes our property without due process of law. These questions were raised at every stage of the progress of the suit.

This claim was set up in the answer filed in the Circuit Court, in the following language:

> "Further answering, defendant alleges that at the time of the issuance of the tax bills described in plaintiff's petition, to the plaintiff, approximately the east half of the land owned by defendant was actually used and occupied for burial purposes; that the plats and records in the office of the Recorder of Deeds of Jackson County, in Kansas City, and the actual occupation of the land, showed that said land was occupied for cemetery purposes, and by actual occupation showed that in approximately one-half of the land the defendant had no beneficial interest, but that the same had passed to various grantees; and defendant alleges that, while it had a superintending control over said land and possible rights of reversion therein, its beneficial interest had passed to various grantees in the part of the land at that time actually used and occupied for burial purposes; that said facts were known to the officers of the city and to the city, and that the officers of said city had no right or authority to issue a single tax bill, including therein not only the property of which the defendant had the absolute title, but also the property in which the defendant had ceased to have any beneficial interest. Defendant alleges that the effect of including all the property in one special tax bill was to double the burden upon the property in which the defendant has the full title and compel this property to remove all burden from the remainder of said ground, in which the defendant has no beneficial interest and the care of which constitutes a liability against this defendant. Defendant further alleges that if any assessment could be made at all against the land of defendant, that the apportionment should have been made in two special tax bills, so that the land of which defendant still retains control might have to

pay for only the proportional part of the cost of the sewer assessed against said land; that the issue of said tax bills against the whole of said land as a single tract constitutes a denial to this defendant of the equal protection of the law, and is a violation of the Fourteenth Amendment of the Constitution of the United States."

At the close of the testimony in the last trial, the defendant asked three declarations of law which were refused by the court, numbers 2, 3 and 5, as follows:

"2.

"The court declares the law to be that if the court finds from the evidence that at the time of the issue of the special tax bills upon which this suit was brought, approximately one-half of the area of the land described in said special tax bills had been sold and was actually used and occupied for the purpose of the burial of the dead, and that said use and occupation was visible and open, and that in only one-half of the area of said land the defendant had any substantial beneficial interest, then the enforcement of the whole amount of each of the special tax bills in suit, as a gross amount, against all the land described in said tax bills, would be a taking of the property of the defendant without due process of law, in violation of the provisions of Section 30, Article 2, of the Constitution of Missouri, and of Section 1, of the Fourteenth Amendment of the Constitution of the United States, and said tax bills are therefore void; and said enforcement would further be in violation of Sec. 1 of the Fourteenth Amendment of the Constitution of the United States, in that it denies to this defendant the equal protection of the laws." ("Refused.")

"3.

"The court declares the law to be that if the court finds the facts as set out in declaration of law No. 2, asked by the defendant, and further finds that no notice was given of the proposed enactment of the ordinance for establishing said sewer district No. 218, nor of the ordi-

nances providing for the construction of said sewers, nor any opportunity for a hearing on any of said matters; then as to the interest of the defendant in the land described in said tax bills said ordinances are void and the enforcement of the same would be a taking of the property of this defendant without due process of law, in violation of Section 30, Art. 2, Constitution of Missouri, and Section 1 of the Fourteenth Amendment of the Constitution of the United States." ("Refused.")

"5.

"The court declares the law to be that if the court finds from the evidence, the defendant has no beneficial interest except the reversion if the lots cease to be used for burial purposes, and that other persons have a beneficial interest in said lots consisting of the right to use said lots perpetually for burial purposes, then the interest of defendants in the entire tract described in said tax bills cannot be sold separately to pay the entire amount of said bills." ("Refused.")

The plaintiff in error excepted to the action of the court in refusing the foregoing declarations of law.

Judgment was rendered for the plaintiff on the first tax bill in the sum of $36,135.65, and on the second tax bill in the sum of $3,012.59.

In the motion for a new trial filed by the defendant the constitutional questions were raised in the following language:

"Seventh. Because the finding and judgment of the court amount to the taking of the property of this defendant without due process of law, in violation of Section 30, of Article 2, of the Constitution of Missouri, and Section 1, the Fourteenth Amendment of the Constitution of the United States.

Eighth. Because the finding and judgment of the court deny to this defendant, the equal protection of the

law, in violation of the Fourteenth Amendment of the Constitution of the United States."

The constitutional questions, thus raised in the trial court were presented, urged and argued both in briefs and orally in the Supreme Court of Missouri when this cause was heard in that court upon appeals, and were decided against the plaintiff in error.

THE FACTS.

The special tax bills upon which this suit was brought depend for their validity upon the provisions of the Charter of Kansas City. The charter under which the work was done and the bills issued, was a charter framed and adopted by the people in accordance with the provisions of Section 16, Article 9 of the Constitution of Missouri, authorizing cities of more than one hundred thousand population to frame their own charters. Under the provisions of this charter, which are printed herein, the Common Council establishes sewer districts, and, when sewers are constructed within a district, the cost of the district sewer is assessed against all the private property in the district, according to the area of the respective tracts.

In 1901, Kansas City established sewer district No. 218. It is the largest district in which a district sewer was ever constructed in the city. The district is, approximately, one and a half miles in length and one mile in width at its greatest width. Generally speaking the land descends from south to north and slopes toward the center line of the district from the east and west sides. The land included in these tax bills is a tract of about thirty-four acres lying on the east side of the district and sloping to the west, and, for much of the way, is the extreme boundary of the district.

The undisputed testimony in the record shows that there was no reason, from an engineering point of view, why this cemetery might not have been established as a sewer district by itself, instead of being included with a large amount of other land. The total area of the district is about four hundred and seven acres. The sewers provided for by the ordinances under which both special tax bills in suit were issued were lateral sewers, and, as shown by the plans, furnished connections for nearly all the platted property contained within the entire district.

The record shows that no sewers were laid within the boundaries of the cemetery property, and the plans which showed the location of Ys where it was intended that house connections should be made, show that in the streets adjoining the cemetery there was no expectation that such connections would be made from the cemetery property.

By a provision of the Kansas City charter authority is given to construct joint district sewers by uniting several sewer districts and assessing land in all of them for the construction of the joint district sewer. While not specified in the charter, the obvious purpose of this provision is to construct lines of main sewer into which district sewers shall discharge, and this is the practical method of applying the charter provision. In this case, however, instead of establishing several sewer districts and then constructing a joint district sewer for the payment of which several sewer districts would contribute, and thus leaving each sewer district to bear the burden of only such lateral sewers as were needed to serve its uses, the very large area specified was made a single sewer district, with the result that, under the charter, this tract of 34 acres which needs no lateral sewers and never will need them, so long as the land is used for burial purposes,

was assessed exactly the same amount per square foot as the land devoted to residence and commercial purposes.

The record shows that this land was devoted to cemetery purposes in 1877 and has been used as such since that time. A plat of a part of the ground was filed in the office of the Recorder of Deeds, and a plat of the remainder was kept by the Secretary of plaintiff in error and used to locate the lots as laid out thereon. There was conflicting testimony as to the value of the unused portion of the land, but the testimony is undisputed that the land already used for burial purposes would have practically no value. The effect of the judgment for the full amount of these special bills, therefore, is that the property of plaintiff in error, of which it owned about 17 acres at the time of the issue of the earlier and larger tax bill, would be sold to pay for the assessment against the tract of 34 acres.

The facts are practically undisputed and our contentions regarding their legal effect are set out in the specification of errors and brief.

The First National Bank of Kansas City, one of the original defendants, was not shown to have any interest in this suit and refused to join in the application for the writ of error, herein, (Rec., 137.)

Mount Saint Mary's Cemetery was outside the corporate limits of Kansas City, until the limits were extended by Ordinance No. 8962 in 1897. Section 9743 R. S. Mo., 1909, provides that courts shall take judicial notice of such extensions of city limits.

The charter provisions of Kansas City relative to the issuance of such special tax bills as those in suit, are as follows:

The Kansas City charter was adopted by a vote of the people, in accordance with Section 16, Article 9 of the State

Constitution, and, in matters relative to local municipal affairs, it has the same effect as an Act of the Legislature. (Charter and Revised Ordinances 1898.)

The Sections of the charter relating to the construction and payment of the cost of sewers are contained in Sections 9, 10 and 11, Article 9, as follows:

> "Sec. 9. Public Sewers—Establishment and Construction of—Cost of How Paid—Bed of Natural Stream Reclaimed—Land Assessed with Benefits—Application of Fund—Public sewers shall be established and constructed at such times, to such extent, of such dimensions and materials, as may be approved by the board of public works, and under such regulations as may be provided by ordinance, and these may be extensions or branches of sewers already constructed or to be constructed, or entirely new throughout, as may be deemed expedient. Public sewers shall be paid for out of the general fund of the city; provided, however, that if in the construction of any public sewer the bed or channel or any natural stream or water course is reclaimed and made valuable to the owners thereof, or real property subject to overflow is reclaimed therefrom, in whole or in part, and made valuable to the owners thereof, or real property adjoining such public sewer is otherwise specially benefited, then the common council may provide that such real property, or any of it, shall be assessed for such special benefits, and the funds derived therefrom shall be used and applied toward the cost and construction in such manner, as may be provided by ordinance."
>
> "Sec. 10. District Sewers—Change of District—Construction and Material of—Cost—Apportionment—Tax Bills—District sewers shall be constructed within the limits of the districts heretofore or hereafter established by ordinance, as each case may be. Any sewer district heretofore or hereafter established may be subdivided, enlarged or changed by ordinance at any time previous to the construction of any district sewer therein. But no such district shall be subdivided, enlarged or changed after a district sewer shall have been con-

structed therein. The city may, with the approval of the board of public works, from time to time, cause a district sewer or sewers to be constructed in any sewer district heretofore or hereafter established whenever the common council may deem such sewer necessary for sanitary or other purposes, and such sewer or sewers shall be of such dimensions, material and character as shall be prescribed by ordinance, and any district sewer heretofore or hereafter constructed may be changed, diminished, enlarged or extended, and shall have all the necessary laterals, inlets, and other appurtenances which may be required. As soon as the work of constructing, changing, diminishing, enlarging or extending any district sewer shall have been completed under a contract let for the purpose, the board of public works shall compute the whole cost thereof, and apportion and charge the same as a special tax against the lots of land in the district, exclusive of the improvements, and in the proportion that their respective areas bear to the area of the whole district, exclusive of the streets, avenues, alleys and public highways, and shall, except as hereinafter provided, make out and certify in favor of the contractor or contractors to be paid, *a special tax bill for the amount of the special tax against each lot in the district.* The city shall in no event nor in any manner whatever be liable for or on account of the cost of work done in constructing, changing, diminishing or extending any district sewer, except as hereinafter provided."

"Sec. 11. Joint District Sewers—Construction of —Cost of—Tax Bills— Joint district sewers may be constructed by the city as follows: Whenever the city may deem it necessary that a sewer should be constructed in any part of the city containing two or more sewer districts it may, by ordinance, unite such sewer districts into a joint sewer district and cause a sewer to be constructed therein in a like manner in all respects as is provided in section ten of this article in cases of district sewers, except in cases of joint district sewers the city may, if deemed proper, provide in the ordinance creating such joint district sewer, that the city shall pay a certain sum to be specified in said ordinance toward the payment of the cost of such joint district sewer, and

should the common council by ordinance unite two or more sewer districts into a joint sewer district for the purpose of constructing a joint district sewer therein, the action of the common council shall be conclusive for all purposes, and no special tax bills shall be held invalid or be affected on account of the included drainage area thereof, or the size, character or purpose of such sewer; provided however, that no district sewer shall be included in such joint district which is not contained in the natural drainage area of the valley or watercourse in which the joint district sewer is proposed to be constructed. The contract for the construction of such sewer shall specify that the city shall be liable for the sum so specified to be paid by the city, and that the remainder of such cost thereof shall be paid in special tax bills, to be issued in any manner that is or may be provided for the issuing of tax bills for the construction of sewers."

The exception mentioned in Section 10, to the provision requiring a separate tax bill for each lot, relates to property owned by Kansas City.

THE TRIAL.

This action has been tried three times in trial court. The petition is in the usual form for the enforcement of liens of special tax bills. A demurrer was interposed to the petition, which was assumed by the court to raise the question that land used solely for cemetery purposes was not subject to sale on execution and was therefore not subject to special assessment. The demurrer was sustained and plaintiff refusing to plead further, judgment was entered in behalf of defendant (plaintiff in error herein.) Upon appeal to the Supreme Court of Missouri the judgment of the Circuit Court was reversed in an opinion which is printed in the Record herein, beginning at page 124. The cause was

remanded to the Circuit Court and an answer was filed setting up the claim that the tax bills were void because they were issued against the whole tract and setting up the fact that the land was used for cemetery purposes, and that a part of the same had been sold and conveyed for burial lots, also that a plat of the cemetery had been filed, and alleging that the sewer was of no benefit to the property of the cemetery association, and that the enforcement of the special tax bills would constitute the taking of the private property of defendant for public use, without compensation, in violation of the Fourteenth Amendment of the Constitution of the United States, and also the Constitution of the State of Missouri. The case was tried upon the evidence introduced and judgment was rendered in behalf of the defendant (plaintiff in error.) This judgment was reversed by the Supreme Court of Missouri, and the opinion is printed in the Record herein beginning at page 119. The cause was remanded to the trial court and tried again upon the issues herein. The answer, as already stated, pleaded specifically the violation of the Fourteenth Amendment of the Constitution of the United States, alleging that the facts set out constituted the taking of the property of defendant, without due process of law, and also denied to defendant the equal protection of the laws. A jury was waived and the case was tried by the court. The defendant asked declarations of law which again raised the constitutional questions hereinbefore set out. The court rendered a judgment upon both counts of the petition in favor of the plaintiff. A motion for a new trial was filed which again asserted the constitutional rights of defendant, and the same being overruled, an appeal was taken to the Supreme Court of Missouri. Upon this appeal the defendant reiterated its claim under the United States Constitution. The cause was heard in Divi-

sion Two of the Supreme Court of Missouri, and an opi[illegible] was rendered affirming the judgment of the trial court. The opinion is published in the Record, beginning at page 107. A motion for rehearing was then filed by plaintiff in error wherein the claim of Federal right was again renewed, and a motion was also filed to transfer the cause to the Supreme Court *In Banc,* upon the ground that the determination of a Federal question was involved. These motions are set out in the Record, pages 113 to 118. Both motions were overruled, and there being no further recourse under the constitution and laws of the state, the judgment became final in the highest court in the State of Missouri in favor of the plaintiff, and from that judgment the defendant therein prosecutes this writ of error.

SPECIFICATION OF ERRORS.

Plaintiff in error assigns the following specific errors committed by the Trial Court and by the Supreme Court of Missouri in this case:

I.

The amount of the two special judgments in this action were determined by the area of the land described in the two counts of the petition of the defendant in error, being about thirty-four acres.

At the time of the issue of the tax bills, plaintiff in error had sold, approximately half of the land, and was the beneficial owner of only seventeen acres.

Both by the City Charter under which the tax bills were issued and under the adjudications of the Courts of Missouri, a single tax bill against several tracts was invalid.

The judgment in this case applying a different rule against the plaintiff in error, denies it equal protection of the laws and thus violates the Fourteenth Amendment to the Constitution of the United States.

II.

The decision of the Supreme Court of Missouri which is found in the opinion of Roy, Commissioner, in the record beginning at page 119 follows the former decision of Court in this case, and in effect deprives the Cemetery Association of its property without due process of law and of equal protection of the laws by deciding that under the Charter and

Ordinances of Kansas City, the tax bills in suit have been lawfully and validly issued against the Cemetery as one tract, including land sold and filled with graves and unsold land without distinction and in authorizing a special judgment against the whole cemetery in gross for the whole amount of the bills.

This decision further deprives the Cemetery Association of its property without due process of law, because its construction of the Charter and Ordinances of Kansas City results in heaping the tax bill burdens of land, sold and filled with graves, upon the unsold part of the cemetery and thus confiscating it for public benefit, in violation of the Fourteenth Amendment to the Constitution of the United States.

A further result of this construction of the Charter and Ordinances of Kansas City is that it denies the Cemetery Association equal protection of the laws by depriving it of the right to redeem any part of the cemetery tract except by paying the taxes on the whole.

III.

The third and final decision of the Supreme Court of Missouri in this case, as shown in the opinion of Roy, Commissioner, in the record beginning at page 107, follows its former decisions in this case and violates the rights of the Cemetery Association under the Fourteenth Amendment to the Constitution of the United States by following its former decisions in this case and in affirming the decision of the Trial Court in construing the Charter and Ordinances of Kansas City to authorize a judgment in favor of the validity of the tax bills under the facts in this case according to former decisions of the Supreme Court of Missouri in deciding that, although one-half of the cemetery land had been sold and was actually used and occupied for the purposes of the burial

of the dead when the tax bills in suit were issued, and that the Cemetery Association had no beneficial interest in this part of the cemetery; yet the enforcement of the whole amount of the tax bills as a gross amount against the whole cemetery tract, without right in any one to redeem any part of it, did not violate the rights of the Cemetery Association under the Fourteenth Amendment to the Constitution of the United States. This last mentioned error of the Trial Court was made by refusing declarations of law requested by the plaintiff in error in the Trial Court (record page 98.) Said declarations of law are as follows:

DECLARATION OF LAW D. 2.

"The Court declares the law to be that if the Court finds from the evidence that at the time of issue of the special tax bills upon which this suit was brought, approximately one-half the area of the land described in said tax bills, had been sold and was actually used and occupied for the purpose of the burial of the dead and that said use and occupation was visible and open, that in only one-half of the area of said land the defendant had any substantial beneficial interest, then the enforcement of the whole amount of each of the special tax bills in suit as a gross amount against all the land described in said bills, would be a taking of the property of defendant without due process of law in violation of the provisions of Section 30, Article 2 of the Constitution of Missouri, and of Section 1 of the Fourteenth Amendment of the Constitution of the United States, and said tax bills are therefore void; and said enforcement would further be in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States, in that it denies to this defendant the equal protection of the laws." (Refused)

DECLARATION OF LAW 4.

"The Court declares the law to be that under the pleadings and the evidence, the finding and judgment of the Court must be for the defendant." (Refused)

IV.

The Supreme Court of Missouri and the Circuit Court committed error in enforcing the two special assessments against the property of plaintiff in error, because, in the very nature of the case, no benefit from the improvement in question could accrue to the property involved, by reason of the use to which it was devoted, and because the assessments against the property of plaintiff in error could not be discharged without the payment of the portion of the assessments computed on the area of land already sold by plaintiff in error, and the judgment enforcing such assessments for their full amount deprives plaintiff in error of its property, without due process of law.

V.

(1) Plaintiff in error relies upon Assignment of Error No. 1 set out in transcript of the record page 138.

(2) Plaintiff in error relies upon Assignment of Error No. 2 set out in transcript of the record page 138.

(3) Plaintiff in error relies upon Assignment of Error No. 3 set out in transcript of the record page 138.

(4) Plaintiff in error relies upon Assignment of Error No. 4 set out in transcript of record page 139.

(5) Plaintiff in error relies upon Assignment of Error No. 5 set out in transcript of record page 140.

ARGUMENT.

I.

The amounts of the two special judgments in this action were determined by the area of the land described in the two counts of the petition of defendant in error, being about thirty-four acres. At the time of the issue of the tax bills, plaintiff in error had sold approximately half of the land and was the beneficial owner of only seventeen acres. Both by the city charter, under which the tax bills were issued, and under adjudications of courts of Missouri, a single tax bill against several tracts of land was invalid. The judgment in this case, applying a different rule against plaintiff in error, denies to it the equal protection of the laws, and thus violates the Fourteenth Amendment of the Constitution of the United States.

The facts in this case are practically undisputed. These two tax bills were issued for the construction of district sewers in sewer district No. 218, in Kansas City, Missouri. Under the Kansas City charter special assessments to pay the cost of constructing district sewers are levied as follows:

> "As soon as the work of constructing, changing, diminishing, enlarging, or extending any district sewer shall have been completed, under a contract, let for the purpose, the Board of Public Works shall compute the whole cost thereof, and apportion and charge the same, as a special tax, against the lots of land in the district, exclusive of the improvements, and in the proportion that their respective areas bear to the area of the whole district, exclusive of the streets, avenues, and public highways, and shall, except as hereinafter provided, make out, and certify, in favor of the contractor or contractors to be paid, a special tax bill for the amount of the special tax against each lot in the district." (Section 10, Article 9, Charter of 1889, p. 147.)

The amounts of the tax bills in issue, were determined by the area of all the land constituting Mount Saint Mary's Cemetery, amounting to about thirty-four acres. (Transcript of Record, p. 54.) At the time of the issue of the first of these tax bills, approximately one-half of the thirty-four acres had been sold for burial purposes. (Transcript of Record, p. 54.) A part of the cemetery ground had been platted and the plat recorded in the office of the Recorder of Deeds of Jackson County, Missouri, January 15, 1878. (Exhibit marked p. 169, following page 96, transcript of record.) Of the remaining part of the cemetery a plat was made but not filed for record, and burial lots were sold with reference to it. (Transcript of Record, p. 54.) Up to about 1898, purchasers of burial lots were given deeds, and, after 1898, perpetual burial licenses were issued. The forms of these instruments are printed herein. (Transcript of Record, pages 56, 57 and 63.) Of the former of these instruments about eight hundred were issued, and of the latter about six hundred. (Transcript of record, p. 64.)

It is the contention of plaintiff in error that, in issuing the special tax bills, in suit, against all of the land originally owned by plaintiff in error, without regard either to the platted lots or to the sale of practically half of the lots, the city violated the provisions of the City Charter, and that the judgment enforcing the liens of the special tax bills applies a rule to plaintiff in error different from that applied to any other property owner, under the Missouri law, and thus denies to plaintiff in error the equal protection of the laws.

The meaning of the guaranty of equal protection of the laws has been stated by this Court:

> "It means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes, in the same place and under like circumstances."
>
> *Missouri* v. *Lewis,* 101 U. S., 22, l. c. 31.

Under Charter provision, very similar to the provisions of Section 10 of Article 9 of the Charter of Kansas City, hereinbefore set out, the Courts of the State of Missouri have held very definitely that an assessment against different lots in gross is invalid. *Fowler* v. *St. Joe,* 37 Mo., 228 involved the question of the validity of certain tax bills for street improvements. An objection was made to the apportionment, and the Court says:

> "We entertain no doubt about the proper construction to be placed upon the amended Charter and that is, that the amount should be apportioned and charged to each lot separately according to its respective front and that the advertisement should conform to the charge and apportionment. Each lot should properly stand encumbered with not more than the charge against it, and the lien on each lot should be several and distinct. Any other construction would be productive of mischief and inconvenience."

Continuing the Court says:

> "The fifteenth section of the Ordinance under which this proceeding to sell is sought to be enforced, gives the person whose real estate is sold, the right to redeem within two years upon payment to the purchaser the amount paid with interest and costs, and Mr. Justice Johnson in *Corporation of Washington* v. *Pratt,* 8 Wheaton, 682, in delivering the opinion of the Supreme

Court of the United States on a question identical with the present one, said, that it resulted not less from the provisions of this eighth section which gives the right of redeeming severally, than from the consideration that in case of a partial sale by the proportion of many lots, the purchaser from him, by the act of transfer may hold his purchase disencumbered of its particular tax either absolutely or upon the contingency upon the remaining lots of its vendor being adequate to the satisfaction of the tax due on the whole. Nor would the purchaser of a single lot hold his purchase unencumbered with taxes due on the whole mass of lots held by his vendor. Each would have the right to redeem upon paying the taxes assessed on his own particular purchase and would hold his purchase subject to such taxes."

The case of the *City of St. Louis* v. *Provenchere*, 92 Mo., page 66, was a suit to enforce the lien of a special tax bill for the opening of a street in the City of St. Louis. The defense was that assessments ran against several lots in gross, instead of separately. The Commissioners assessed the benefits to lots 68 to 74 in Provenchere Addition to the City of St. Louis, as one lot, at the sum of $77.20 and the tax bill issued was in accordance with the assessment. The Court says, after citing the law:

"There can be no question that the provisions of this section require a separate assessment of the amount of benefit to each lot and provides that that amount, only, shall be a lien on such lot and the Commissioners had no authority to increase the burden on any such lot by grouping together a number of lots and assessing them in gross, the effect of which would be to make the amount assessed upon the whole number of lots, a lien on each, which amount would have to be paid in full before any one of them could be discharged therefrom, since the Courts are without power to make apportionments. The owner had a right to have each

of these lots assessed specifically for the benefit of each of them so that he might redeem any one of them by paying the tax specifically levied thereon, a right of which he would be deprived if the mode of assessment adopted in this case should be sanctioned."

The Court sustained the judgment of the Circuit Court holding that the bill could not be collected and cites from Cooley on Taxation, page 401, what it terms the general principle governing such cases, as follows:

> "When two parcels are owned by the same person, if the Statute requires separate assessments, obedience to the requirement is essential to the validity of the proceeding. It cannot be held in any case that it is unimportant to the tax payer whether this requirement is complied with or not. It is made solely for his benefit * * * and where a requirement has for its sole object the benefit of the tax payer, the necessity for a compliance with it cannot be made to depend upon the circumstances of a particular case."

The same doctrine is announced in *Clinton* v. *Taussig,* 8 Mo. App., 602 and *Kemper* v. *King,* 11 Mo. App., 116. We find no decisions of the Appellate Courts of Missouri in conflict with the foregoing cases except the case at bar and in the case at bar the Court does not overrule its prior decisions, and does not attempt to distinguish them. The result seems to be, that a special rule of law has been made for the plaintiff in error in this case. That the cemetery has been divided into lots both by platting of the same and by the selling and conveying of portions of it from time to time, is undisputed fact in the record, and the decision of the Supreme Court of Missouri in this case construing and administering the Charter of Kansas City and the laws of Missouri, so as to make the cemetery tract, for the purposes of taxation, one lot, is in plain violation of the letter and the

spirit of the Fourteenth Amendment to the Constitution of the United States guaranteeing to the plaintiff in error the equal protection of the laws.

In a recent case in this court, *Greene* v. *Louisville & Interurban R. R. Co.*, 244 U. S., 499, this court sustained an injunction granted by the United States District Court for the district of Kentucky. The injunction was against certain state officers, enjoining them from certifying certain franchise taxes against the complainant. The bill of complaint stated that complainant's property was assessed at 75% of its real value, while the property generally in the state was assessed at not more than 52%. It was held by this court that, while the law of Kentucky was constitutional, the discrimination under the law was a violation of the state law requiring equality of taxation. This court did not pass on the question whether such acts constituted a violation of the Fourteenth Amendment of the Constitution of the United States, for the reason that complainant's rights were as fully protected by the state constitution requiring equality of taxation as by the provision for equal protection of the laws. It cannot be questioned, however, that this court has the same authority to enforce the protection given by the Constitution of the United States as fully as provisions of state laws or constitutions.

In the case at bar, we do not question the constitutionality of the Kansas City Charter providing for the payment of the cost of district sewers by assessment according to area of the land within the sewer district. Our complaint is that the action of the city officers in this case, in issuing one tax bill, the amount of which was determined by including the area of land not owned by plaintiff in error with the land still owned by it, was a plain denial to plaintiff in error of the equal protection of the laws. It has often been held that the jurisdiction of this court and the determination

of its decisions depends, not so much on the form of the legislation whose validity is challenged, as upon the result, as construed by the State Courts.

Detroit United Ry. Co. v. *Mich.*, 242 U. S., l. c. 247.

In a case where under the Constitution of Ohio, requiring uniformity of taxation against all property, the assessing officers adopted a rule assessing bank stock at full value, while other personal property was assessed at 60% and real estate was assessed at 33-1-3% of value, it was held that a court of equity would enjoin the collection of the excessive tax. This court held the infirmity was not in the Ohio Statutes but was in their administration.

Cummings v. *National Bank*, 101 U. S., 153.

These cases cited, like the case at bar, are cases involving taxation. This question has been presented at every stage of the progress of this suit, and it is submitted that, both upon reason and authority, the action of the Courts of Missouri should not be sustained.

The constitution of South Dakota provided for uniform taxation upon all real and personal property, according to its value, and that the legislature should provide, by general laws, for the assessing and levying of taxes on all corporate property, as near as may be, by the same methods as were employed for assessing and levying taxation on individual property. While these provisions were in force, the legislature passed a law requiring the express companies and certain other corporations to make reports of their gross income, and requiring the Board of Assessment and Equalization to take into consideration such gross income, in assessing such property for taxation. Injunction

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suits were brought by Wells, Fargo & Company and the American Express Company to enjoin the collection of taxes, after tenders of amounts based on their respective returns. The evidence was that the assessment of the value by the public officials was evidently based on the gross income of the companies. On appeal to this court from the judgment of the Circuit Court of Appeals granting the injunction, the judgment was affirmed. The court says:

> "The stringent provisions of the constitution of South Dakota, then in force, required the adoption of a rule of valuation, as near as might be, of like character, in assessing individual and corporate property in the state, and, here, the record shows the valuation of the property of the express companies was based principally upon their gross incomes, determined by the method already described. Such administration of the statute would be illegal, although the law, upon its face, is unobjectionable."

Johnson v. *Wells, Fargo & Co.*, 239 U. S., 234 l. c. 242.

We do not see that it makes any difference that, in the case cited, the inequality in assessment was forbidden by the state constitution, and, in this case, we are asking protection under the Federal Constitution guaranteeing equal protection of the laws. Neither do we see that it makes any difference that, in that case, the amount of the assessment was unlawfully increased, by considering income, and that, in this case, the assessment against the land really owned by plaintiff in error is increased by considering the area of land already sold.

It is, therefore, respectfully submitted that in view of

the fact that the uniform construction of similar laws in Missouri by the Supreme Court has been to make each tract of land liable only for the amount of the assessment against the particular tract, the inclusion, in one tax bill, of land platted into different lots, and practically half of which has been sold and used for burial purposes, applies a different rule of law to plaintiff in error from that enforced against any other property owner, and thus violates the Fourteenth Amendment of the Constitution of the United States, by denying to plaintiff in error the equal protection of the laws.

II.

While in matters relating to special assessments for benefits legislative determination of the district to be taxed and the basis of apportionment will generally be held to be due process of law, even without notice and a hearing, it will not be so held in a case where it clearly appears that the power was arbitrarily exercised in a manner which imposed an excessive burden, without a compensating benefit of any kind. Such application amounts to confiscation and violates the due process provision of the Fourteenth Amendment.

> "Power arbitrarily exercised, imposing a burden without a compensating advantage of any kind, amounts to confiscation, and violates the due process provision of the Fourteenth Amendment."
>
> *Myles Salt Co.* v. *Iberia Drainage District*, 239 U. S., 478. (Syllabus.)

> "A law establishing a taxing district under which there is no reasonable presumption that substantial justice will be done, but under which parties will probably be disproportionately taxed, cannot stand as constitutional against one so actually taxed."
>
> *Gast Realty & Investment Co.* v. *Schneider Granite Co.*, 240 U. S., 55.

Where the law was upheld but it was apparent that the commissioners who assessed benefits did not properly apply the law so as to limit benefits assessed to the amount of benefits received, the court will not sustain the assessment.

Martin v. *District of Columbia,* 205 U. S., 135.

In each of the above cases the law was not held to be unconstitutional, but by reason of the method of the application of a valid law to the facts in the several cases, the assessments could not be sustained.

In the first case, owing to the topography of the land, it was evident that the land involved in the suit had been included in the drainage district simply for the purpose of making it contribute to the cost of the work, not by reason of any benefit which it could receive.

In the second case, it was held that when the provisions of the St. Louis charter did not limit the property to be assessed for paving a street to a reasonable distance from the street paved, its application to property for which there was no rational probability of any benefit conferred would be held unlawful.

And, in the third case, it was evident that the commissioners to assess benefits had not limited their several assessments to the benefits actually received by the respective tracts of land, but had merely apportioned amounts to be paid by the several tracts of land in order to meet a definite amount of damages and costs.

It is submitted that the case at bar is analogous to the cases cited. In this case there was no substantial benefit which could accrue to the property of plaintiff in error, because of the purposes to which it was devoted, and it was

improper to so levy the assessments that the property of which the plaintiff in error still has the beneficial ownership must pay for the portion of the assessment computed on the area of the land which it had sold, and which was a liability, instead of an asset. We complain not of the law but of the manner in which it was applied.

Our contention is that the exercise of that power, as against the property of plaintiff in error, was arbitrary and unlawful. There was no necessity for including the land of plaintiff in error in sewer district No. 218. Both as an engineering and a legal proposition, it might have been included in a district by itself (Transcript of Record, page 41). By the use to which it was devoted, there was no occasion for the multitude of lateral sewers required to serve property used in a city for residence or commercial purposes. The sewers constructed under the contract for which the larger tax bill was issued amounted to approximately fourteen and a half miles in length (Transcript of Record, p. 38). None of this was built within the boundaries of the cemetery. The plans showed that on some of the streets adjoining the cemetery, in which sewers were laid, it was not contemplated that there should be any connections from the cemetery property (Transcript of Record, p. 41).

The effect of this judgment is to impose an exceedingly large burden, amounting to about Forty Thousand Dollars, upon the property of plaintiff in error, in spite of the fact that lateral sewers can be of no possible benefit to a cemetery. This injustice, of course, is aggravated by the fact that this judgment must be enforced by the sale of seventeen acres of ground, while the amount of the judgment is computed on thirty-four acres. This result comes from the fact, shown by undisputed evidence, that the land already sold and used for burial purposes, is of no value (Transcript of Record, p. 91). And from the further fact that the

owners or persons interested in these lots, were not parties to the suit, and their interests cannot be affected.

It cannot be said that plaintiff in error sold these lots, with the understanding or knowledge that it would be liable for special tax bills which might be issued against them. Many years before these bills were issued, the provisions were contained in the statutes, and are now known as the following sections (R. S. Mo. 1909, Section 1307):

> "• • • Lands appropriated and set apart as burial grounds, either for public or private use, and so recorded in the Recorder's office of the county where such lands are situated, or any burial ground that may have been used as such, for ten years, shall not be subject to sale on execution, to dower, nor to compulsory partition: provided that the lands so appropriated and set apart as a private burial ground shall not exceed one acre in area, or one hundred dollars in value."

This Statute was first enacted in 1855.

And Section 2181:

> "• • • All courthouses, jails, clerks' offices, and other buildings owned by any county or municipality, and the lots on which they stand, and all burial grounds shall be exempt from attachment and execution."

This statute was first enacted in 1865.

It had been held by the Supreme Court of Missouri that, if an execution could not be issued to enforce a special assessment, there could be no valid special assessment.

> *City of Clinton, ex rel,* v. *Henry County,* 115 Mo., 557-570.

These provisions of the statute were taken at their face value, upon the first trial of this case, when the trial court

sustained a demurrer to the petition, upon the grounds just indicated.

This view of the law had been adopted in other states.

In *Mt. Auburn Cemetery* v. *Cambridge,* 150 Mass., l. c. 15, the Court said, in speaking of the assessment of taxes for sewers against Mr. Auburn Cemetery:

> "The remote benefit by reason of which the special tax was authorized to be imposed, must be understood to be a pecuniary benefit resulting from the increased market value of the land and which cannot be predicated of land which has not and cannot have a market value."

Again, in the same case, 150 Mass., l. c. 17, the Court said:

> "The statute provides that the assessment shall constitute a lien upon the real estate assessed. The Legislature could not have intended to authorize a sale of the cemetery under this provision. * * * It was exempt from taxation and from execution. It was protected from desecration or injury by penal Statutes. * * * Whether the deeds conveyed title to the land or only a beneficial interest in it is immaterial. If the Legislature intended that the legal title should remain in the corporation, it did not intend that the graves of the dead should be sold to pay for drains and sewers for the houses of the living."

Again in *Mt. Auburn Cemetery* v. *Cambridge,* 150 Mass. l. c. 18, the Court said:

> "As there is no other way in which the tax can be collected and the provision made for collecting the tax does not apply to an assessment upon this land, the inference is strong that it was not intended that the land should be assessed."

While it is the rule of this court to adopt the decisions of the court of last resort upon the construction of a state statute, we cite these statutes for the purpose of showing the entire situation, in order that the court may fully understand the injustice done to the plaintiff in error by the method in which a perfectly valid law was administered, and to invoke the doctrine frequently announced by this court, that there are limits beyond which the power of legislative taxation for benefits will not be sustained.

In the case of *Cemetery Company* v. *Newark,* 50 N. J. Law 66, a case in which an assessment was made against the Cemetery Company for an entire street frontage for widening an avenue, although a large part of this frontage had been conveyed for burial lots, the Court said:

> "The assessment in this case was made upon the entire strip of 100 feet without regard to the fact that the larger part of it had been conveyed away and the burden was imposed to the same extent as if the lands were appropriated to residence or business purposes.
>
> In this respect, I think, the Commissioner in making this assessment applied an incorrect legal principle. The only authority which the Cemetery Company could exercise over the portion conveyed was the right to enter upon it for the purpose of keeping the grounds in repair. It had no other beneficial interest in it as to that portion, and the widening of the avenue could confer upon the relator no appreciable benefit * * * In respect to the portion of the assessed strip which had been conveyed for burial lots, the assessment is erroneous and illegal and therefore the assessment must be corrected in that particluar."

III.

The decision of the Supreme Court of Missouri, that under the Charter and Ordinances of Kansas City, Mount St. Mary's Cemetery was properly included in a sewer district

with a very large area of residence property, and that tax bills might legally be issued against the sold and unsold cemetery lots in gross, so that the unsold lots might be seized under execution for the part of the tax bills chargeable to the sold and occupied lots, whose owners are not parties to this suit, amounts to a denial to the Cemetery Association of due process of law and of equal protection of the laws, for following additional reasons:

Under this decision, the Cemetery Association cannot redeem its unsold lots without paying the tax bill charges on other lots in which it has no legal or beneficial interest, and under this decision it is doubtful whether it can now sell and convey the unoccupied portion of the cemetery in lots or in a body, so as to relieve it in the hands of purchasers from future tax bills against the other portions which are now filled with graves. The assessment of tax bills against several lots in gross, in a divided or platted tract is illegal. See *Supra,* (*St. Louis* v. *Provenchere,* 92 Mo., 66; *Washington* v. *Pratt,* 8 Wheaton, 682.)

When this case was before the Supreme Court of Missouri for the second time (see opinion, Record, p. 119) that court decided, that in spite of the covenants in their warranty deeds, the lot owners in Mount St. Mary's Cemetery had not a fee title to their lots, but an easement or burial right. We believe that this decision is unconstitutional in that it attempts to divest well vested titles to real estate by merely declaring such divestiture.

But if we grant for the purposes of argument that this decision is the law in this case, it still remains true that the easement of every lot owner is exclusive and perpetual, and forever takes his lot out of the salable holdings of the Cemetery Association, and so no future benefit to the occupied lots can be of any benefit to the Cemetery Association.

If this decision is the law, the tax bill burdens of the Cemetery Association increase as its unsold land diminishes,

and when every lot in the cemetery is sold and contains a grave or graves, this situation will exist: Tax bills will be charged against a tract of land of which the Cemetery Association is nominally the owner; but from which it cannot hope to derive a dollar of revenue, or receive benefit in any manner whatever from alleged improvements, such as sewers.

It follows, in such a crisis, that the graves of the dead, many of whom have no living relatives, must be sold "to pay for sewers for the homes of the living." It is unbelievable that such a thing is warranted by law in the United States.

It has, for many years been well-settled law in Missouri, that special tax bills can be upheld only upon the theory of special benefits to the land against which the tax bills are issued. (*Neenan* v. *Smith,* 50 Mo., 525; *Asphalt Const. Co.* v. *Hauessler,* 201 Mo., 400, l. c. 410).

It follows from the rule of law in Missouri, as announced in the foregoing cases, that no personal judgment can be rendered against the Cemetery Association, and any attempt to force it to pay special tax bills out of any other property which it might have, would be an attempt to take its property without due process of law, and to deprive it of the equal protection of the laws. The effect of the decision of the Supreme Court of Missouri in this case, at present, is to render a cemetery area, of more than fifteen acres filled with graves, nominally liable with other cemetery land, to seizure and sale for special tax bills as one tract. Of course, practically speaking, this area is not liable in the sense that it may be sold and used for other purposes by a purchaser. The owners of the lots in this part of the cemetery are not parties to this suit and the criminal statutes of the State of Missouri, as well as common decency, render

the spoliation of this land impossible. To say that it is liable with the other land which is unsold, is a mere subterfuge to heap its tax burden upon the other land. The decision of a court, which in effect heaps the taxes of lots sold, conveyed and occupied upon the unsold lots until the confiscation of a cemetery is the unavoidable result, is contrary to the law of the land.

The decisions of the Supreme Court of Missouri in this respect stand without the support of either precedent or principle of constitutional law and they should be reversed by this court.

In support of the foregoing propositions, we cite authorities, which may be multiplied by many others from the Supreme Court of the United States:

In *Wagner* v. *Baltimore,* 239 U. S., l. c. 220, the court said:

> "The constitutional protection against the deprivation of property, without due process of law, would certainly be available to persons arbitrarily deprived of their private rights by state action, whether under the guise of legislative authority or otherwise."

In *Myles Salt Co.* v. *Drainage Dist.,* 239 U. S., 478, it was held, that:

> "Although under the law of Louisiana the action of the police jury in determining, in the exercise of its discretion, what property shall be included in a drainage district, can not be inquired into except upon a special averment of fraud, one not charging fraud or attacking the statutes of the State, may attack the law as administered, as depriving him of his property without due process of law, by the inclusion within a drainage district of property in no wise benefited by the proposed system, and thus raise a Federal question, giving this court the right to review an adverse decision."

In *Gast Realty Co.* v. *Schneider, Granite Co.,* 240 U. S., 55, the court held, that:

> "A law establishing a taxing district, under which there is no reasonable presumption that substantial justice will be done, but under which parties will probably be disproportionately taxed, cannot stand as constitutional against one actually so taxed."

In *Martin* v. *Dist. of Columbia,* 205 U. S., 135, a similar ruling was made.

In the case of the *City of Seattle* v. *Mt. Pleasant Cemetery Assn.,* 59 Wash., 41, 109 Pac. Rep. l. c. 1054, the court said, in a case where occupied cemetery lots and unsold cemetery lots were taxed in gross:

> "It would be clearly erroneous and prejudicial to the rights of an owner to have his land assessed with other lands, by charging the assessment against all as one tract, when the other lands are exempt from such assessment, upon the theory that the whole is assessable, even though the owner might have some interest in the exempt lands. It is plain that the assessment burden which would fall upon the exempt land, if it were assessable, cannot be placed upon the other land, except by apportioning it upon all the taxable land in the district."

IV.

The decision of the Supreme Court of Missouri, in construing the Charter of Kansas City to authorize the tax bills in suit in this case, and in holding, in effect, that the unsold cemetery lots might have the tax bills against the whole cemetery tract heaped upon them, amounts in this case to a confiscation of the unsold lots of the cemetery land for the benefit of the city lots in the sewer district.

The judgment against Mount St. Mary's Cemetery Association in this case (Record, p. 111) is for $36,135.65, on

one count, and for $3,012.59 on another count, making a total judgment of $39,148.24. Evidence was offered by the Cemetery Association in the trial court and rejected, to show that sewer tax bills for about $10,000 were issued against the Cemetery prior to those in suit (Record, p. 40). These prior tax bills with accrued penalties now aggregate about $20,000. The judgment for $39,148.24 in this case includes the penalties provided for in the tax bills. The Cemetery Association was penalized at the rate of ten per cent per annum, for refusing to waive its exemption rights under the laws of Missouri, as they stood when the tax bills were issued.

But aside from the penalties, the face of the sewer tax bills issued against cemetery land was $29,854.44, including the tax bills not involved in this suit. Cemetery land, by reason of its character, cannot be sold except in the slow, regular course for cemetery purposes. It has no market value at all for any other purpose. One of the plaintiff's witnesses in this case said, that any man who would attempt to sell this land, covered with graves and monuments, for any purpose but for cemetery purposes, would be an idiot. (Record, p. 92.) It is plain, then, that while witnesses testified that the land was worth, for residence purposes, from fifteen hundred dollars to four thousand dollars per acre in this vicinity, the fact is that this land is not available for residence purposes and, as such, is not salable at all, and receives no commercial benefits from sewers.

The regular course of sale of the balance of the cemetery lots which were unsold in 1904 would take about twenty-three years (Record, p. 96). About half the cemetery land, or about seventeen acres, remained unsold in 1904 (Record, p. 108), and there was only ten acres in which no interment had been made (Record, p. 124). It was upon this unsold land, which could not and can not be sold ex-

cept in a gradual way covering a period of approximately twenty-three years, that Kansas City suddenly cast a burden of $29,854.44, in sewer tax bills, under the guise of its taxing power, for the benefit of a large residence district. This burden amounted to more than seventeen hundred dollars per acre on the unsold land, and the tax bills provided for a ten per cent penalty for failure to pay them when due. The imposition of such taxes for such purposes, under the circumstances in this case, is confiscation pure and simple, no matter how you may attempt to disguise it.

The lateral sewers for which these tax bills were issued, could not possibly benefit this cemetery land at all, in the sense in which benefits are understood in the law. None of these sewers were laid in the cemetery ground and no openings were made in the sewer pipes on the side next to the cemetery. It is simply an insulated tract within the district (Record, p. 108).

The City Council had complete power to make a separate district of this cemetery for the purposes of just and reasonable taxation, and it had done so in the case of other cemeteries, as plaintiff in error offered to prove in the trial court when this case was tried (Record, p. 40).

We submit that the whole record in this case presents a glaring instance of an unjust and oppressive exercise of taxing power by Kansas City, as well as a case of arbitrary discrimination against this cemetery. The area rule of special taxation is one which is clearly intended to apply to land only which is used for city lots or kindred purposes.

It was well said in the case of *Mt. Auburn Cemetery* v. *Cambridge*, 150 Mass., l. c. 17, that it could not be intended that land used for burial purposes only should be deemed equally benefited by the construction of sewers with building lots in the vicinity,

The application of the area rule to the land of the Cemetery Association in this case is, in its effect, not merely unequal, unjust and oppressive; it is confiscatory. Where it appears that property is confiscated under the guise of taxation, the constitutional rights of a property owner are invaded, and the manner in which a legislative body exercises its taxing powers in such a case, becomes a proper subject for judicial review and correction. (*Norwood* v. *Baker*, 172 U. S., 269; *Norwood* v. *Baker*, 74 Fed., 997.)

In *Myles Salt Co.* v. *Drainage District*, 239 U. S., l. c. 485, the Court said:

> "It is to be remembered that a drainage district has the special purpose of the improvement of the particular property and when it is so formed as to include property which is not and cannot be benefited directly or indirectly, including it only that it may pay for the benefit to other property, there is an abuse of power and an act of confiscation."

IN CONCLUSION.

The effects of the decisions of the Supreme Court of Missouri in this case, when they are all taken together, are:

First: To make a special rule of law against the plaintiff in error in this case, contrary to the Charter of Kansas City, by which the tax bills in suits are declared valid, although they are contrary to the charter, and are issued against the whole cemetery, instead of the lots or parcels of land which compose it, and under this special rule, it must result that the tax bill charges against land which can not be seized and sold in this suit, because it has been conveyed to individuals who have filled it with graves, and because these record owners are not parties to this suit, may be charged against the cemetery land, in gross, and collected by a pretended sale of the whole cemetery (which is only

a subterfuge for a sale of the part still owned by the Cemetery Association), to pay the tax burdens upon the whole.

Second: The second effect of these decisions is to validate a construction of the Charter of Kansas City under which it is said to be proper and legal to include this cemetery in the largest sewer district ever created in Kansas City, when in similar cases other cemeteries were made separate districts, and when it was obvious in this case that the tax upon the cemetery land for lateral sewers under the area rule would be grossly out of proportion to any probable benefit to the cemetery land.

Third: The third effect of these decisions is to place upon a charitable corporation, which should at least stand equal before the law with other corporations, especially as it assists the State by assisting in the support of orphans which would otherwise become state charges, a ruinous and unjust tax burden, without any appreciable corresponding benefit to its property.

We respectfully submit that under the facts of this case, these decisions of the Supreme Court of Missouri are contrary to the Fourteenth Amendment to the Constitution of the United States and that the Charter and Ordinances of Kansas City, relative to this case as construed and administered by the Supreme Court of Missouri in this case, violate the fundamental principles of justice as they are embodied in this Amendment and as they exist in the law of the land.

We believe that these decisions should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1914

MOUNT ST. MARY'S CEMETERY ASSOCIATION, PLAINTIFF IN ERROR,

vs.

W. C. MULLINS, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF MISSOURI.
FILE NUMBER 25536.

BRIEF FOR DEFENDANT IN ERROR.

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No. 304.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1917.

MOUNT ST. MARY'S CEMETERY ASSOCIATION, PLAINTIFF IN ERROR,

VS.

W. C. MULLINS, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF MISSOURI.
FILE NUMBER 25580.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT.

Kansas City, Missouri, is governed by a charter, adopted by a vote of the people as provided under the Constitution of the State of Missouri.

Under its charter the common council, its legislative body, has authority to establish sewer districts and

to provide for the construction of sewers in such districts for sanitary and drainage purposes, and to levy special assessments against all the lands in said districts, exclusive of streets and alleys, to pay for such work. The assessment is levied not upon the front foot rule, but according to area, and all the land is taxed the same, without regard to improvements thereon. After a sewer has been constructed in a district no change in the boundaries of the district can thereafter be made. Sewers in any district may be constructed from time to time, whenever the common council may deem the same necessary for sanitary or other purposes. Sewer district 218 was regularly established by the common council as provided by the charter, and the construction of the sewers involved in this action were duly authorized, and the letting of the contract therefor duly advertised, and the contract therefor duly awarded to defendant in error, and the contract duly confirmed by the common council, all in strict conformity with the provisions of the charter, and the work was done by defendant in error in full compliance with his contract. The cost of the work, after its completion was duly apportioned by the Board of Public Works, among the several "lots or parcels of land charged therewith, and the tax bills therefor duly made out and delivered to the contractor (City Charter, Sec. 17, Art. IX). The tax bills involved in this action were made payable in four equal annual installments, as was authorized by the charter.

During all the time covered by the proceedings relative to the construction of said sewers, and at the time

of the institution of the suit to enforce the lien of said tax bills, plaintiff in error was the owner of the tract or parcel of land described in the tax bills. In its answer (page 12 of the record) it says:

> "It admits that it is a corporation of the State of Missouri, and that it owns the land in said petition described, which it holds as trustee for the improvement of Mt. St. Mary's Cemetery, of which said land is a part, and also for certain orphan asylums of Kansas City, Missouri, except, however, such portions or lots thereof as it has sold and conveyed for burial lots," * * * "and defendant alleges that while it has a superintending control over said land and possible rights of reversion therein, its beneficial interest had passed to various grantees in the part of the land at that time actually used and occupied for burial purposes" (Record, page 14).

The evidence shows that the land described in the tax bills is bounded on the south by 23rd St., on the east by Jackson Avenue, on the north by what would be 20th Street if extended, and on the west by Cleveland Avenue, and that the whole tract was enclosed by a fence, with one opening for vehicles on 23rd St., and a gateway for pedestrians on Jackson Avenue. Also that the plaintiff in error had full charge and control of the whole tract consisting of about 34 acres.

The testimony shows that this tract is so located as to be within the drainage district served by the sewer. A sewer was constructed on 23rd Street and Cleveland Avenue, adjacent to this tract and also on Jackson Avenue, along the east side of part of the tract.

The testimony shows that this tract of ground slopes to the northwest, towards its northwest corner. That Cleveland Avenue had been graded so as to be some ten or fifteen feet higher than the surface of this land, near the northwest corner. That to provide for the drainage of its ground plaintiff in error had connected a ten inch drain pipe, some four hundred feet long, to the sewer at Cleveland Avenue whereby the surface water had passed into this sewer (Record, page 68), because the Board of Health forbade the damming up of the water. The testimony also shows that if such connection had not been made so much surface water would have accumulated at that point that a lake or pond would have been formed one hundred feet wide or more, a couple of hundred feet long or longer and ten feet or more deep (Record, page 90). The City Charter (Sec. 18, Article IX) provides *inter alia;* "every special tax bill, if paid within thirty days from the date of issue shall bear no interest, if not paid within such time shall bear interest from the date of issue at the rate of ten per cent per annum, except as herein otherwise provided. No such tax bills need give the name of any party owning or interested in the land charged and bound by the lien, and before suit the owner of any part in severalty or of any undivided interest in any land charged by any tax bill may pay his share separately, in which case his part or interest shall not be further liable in case of suit."

"Every tax bill shall, in any suit thereon be *prima facie* evidence of the validity of the bill, of the doing of the work and of the furnishing of the material charged

for and of the liability of the land to the charges stated in the bill; provided that nothing in this section shall be so construed as to prevent any defendant from pleading and proving in reduction of any bill, any mistake or error in the amount thereof, or that the work therein mentioned was not done in a good and workmanlike manner; and provided further, that if any party shall plead any mistake or error in the amount of the bill, or that the work was not done in a workmanlike manner, and that such party before the commencement of the suit tendered to the contractor or holder of the bill the full value of the work done and shall establish the same on trial, the recovery shall only be for the amount so tendered and judgment for costs shall be rendered against the plaintiff.

Under the provisions of the City Charter, the lien of special tax bills cannot be enforced by a summary proceeding, but to enforce such lien suit must be brought in some court of competent jurisdiction, and service had as in ordinary actions. This suit was brought on the .... day of July, 1907, in the Circuit Court of Jackson County, Missouri. Plaintiff in error was duly served with summons and appeared and demurred to plaintiff's petition on the ground that land owned by a cemetery association was not subject to special assessments for public improvements. The court below sustained the demurrer, and defendant in error appealed to the Supreme Court of Missouri, which reversed the judgment of the lower court and remanded the cause (*Mullins* v. *Cemetery*, 239 Mo. 681).

After the cause was remanded the plaintiff in error filed an answer setting up the claim that the tax bills were void, because it said there should have been a separate tax bill against each burial lot which had been sold by it. Upon the trial upon this issue the Jackson Circuit Court upheld the contention of plaintiff in error and rendered judgment for it. Defendant in error again appealed to the Supreme Court, which reversed the judgment of the court below and remanded the cause (*Mullins* v. *Cemetery*, 259 Mo. 142).

The plaintiff in error then filed an amended answer alleging in substance that the tax bills were void, because there should have been two tax bills issued instead of one. Also that its property received no benefit from the improvement. Plaintiff in error has set forth in its statement of facts two declarations of law asked by it and refused by the court (Statement, pages 7, 8), but has not set out the following declaration of law asked by it and given by the court:

The court declares the law to be that if the court finds from the evidence that at the time of the enactment of the ordinance establishing sewer district 218, and for several years prior thereto, the land described in the tax bills which constitute plaintiff's cause of action, was held and used by defendant and those claiming under it only for cemetery purposes and continued to be so used until the present time, and that no sewers were constructed into or through the land described in said special tax bills, and that there was no necessity of any such sewers and

that the same constitutes no present nor prospective substantial benefit to the land of this defendant, and that there was no present or prospective necessity for any sewer to be extended into or through said land in order to furnish adequate facilities for the surrounding land, and if the court further finds that there was no reason why said cemetery land should not have been established as a sewer district by itself without including other lands, then the enactment of the ordinance establishing sewer district 218, and the enactment of the ordinance providing for the construction of the sewers for which the tax bills in suit were issued, were an unreasonable and oppressive exercise of the powers of the city as to this defendant's interest in the land described in said tax bills, and said tax bills are void and constitute no lien against said land as described therein" (Record, page 98).

Upon the third trial the court rendered judgment for defendant in error, which judgment was affirmed by the Supreme Court of Missouri, 268 Mo. 691.

As before stated the land embraced in the tax bills was about thirty-four acres, or approximately 1,496,000 square feet. The face of the two tax bills amounts to $19,129.99, so that the assessment per square foot against this land was one and twenty-eight hundredths cents.

The land sells at from fifty to seventy cents per square foot for burial purposes, and since the first tax bill in suit issued plaintiff in error has received approximately seventy thousand dollars from burial permits (Record, page 66).

Plaintiff in error has never at any time offered to pay, or tendered any part of the tax bills.

BRIEF.

I.

It is not the law in Missouri that a single tax bill against several lots is invalid.

Wolfert v. *The City of St. Louis*, 115 Mo. 139, l. c. 144.

Construction Co. v. *Locvy*, 64 Missouri Appeals, 430, l. c. 437.

Hill-O'Meara Construction Co. v. *Sessinghaus*, 106 Mo. App. 163, l. c. 166.

See also *Parsons* v. *City of Grand Rapids*, 141 Mich. 467.

II.

For the purpose of assessments for local improvements, the Cemetery Association was the owner of the land; all the deeds and certificates issued by it under which burial lots were held, provide that they are held for burial burposes only.

Mullins v. *Cemetery Association*, 259 Mo. 142.

Buffalo City Cemetery v. *City of Buffalo*, 46 N. Y. 503.

Perkins v. *Lawrence*, 138 Mass. 361.

Kincaid's Appeal, 66 Pa. Ct. 411.

Went v. *M. P. Church*, 80 Hun. 266.

Jacobs v. *Children of Israel*, 107 Ga. 518.

Scheir v. *Trinity Church*, 169 Mass. 1.

Gardner v. *Swan Point Cemetery*, 20 R. I. 646.

Richards v. *N. W. Protestant Dutch Church*, 7 Howard (N. Y.), 476.

Partridge v. *First Church*, 39 Md. 631.

Lima v. *Cemetery Association*, 42 Ohio St. 128.

III.

Plaintiff in error has not been denied due process of law; nor has it been denied the equal protection of the law.

The lien of the tax bills could not be enforced other than by a proceeding in some court of competent jurisdiction after service of process, in which proceeding plaintiff in error might appear and plead and prove if it could, any mistake or error in the amount thereof or that the work was not done in a good and workmanlike manner.

City Charter, 1898, Sec. 18, Article IX, page 154.

Davidson v. *New Orleans*, 96 U. S. 104.

Spencer v. *Merchant*, 125 U. S. 345.

Corry v. *Campbell*, 154 U. S. 629.

Shumate v. *Herman*, 181 U. S. 402.

French v. *Barker Asphalt Paving Co.*, 181 U. S. 324.

L. & N. R. R. v. *Barker Asphalt Paving Co.*, 197 U. S. 430.

Embree v. *Kansas City & Liberty Bond Dist.*, 240 U. S. 242.

Williams v. *Eggleston*, 170 U. S. 304.

Houck v. *Little River Drainage District*, 239 U. S. 254, l. c. 262.

Field v. *Barker Asphalt Paving Co.*, 194 U. S. 618.

IV.

The question of benefits or no benefits to the property, if open to judicial inquiry, is a question of fact; and in this case that question was submitted to the trial

court, upon the evidence, and the instruction asked by plaintiff in error and given by the court (Record, page 98).

The court found the facts against plaintiff in error. That finding does not raise any Federal question and will not be reversed by this court.

A. Barcus, Jr. Sons v. *Fort Street Union Depot Co.*, 169 U. S. 557, l. c. 565.

Spencer v. *Merchant*, 125 U. S. 345.

ARGUMENT.

The common council under the charter of Kansas City is a legislative body. Its ordinances, within the scope of its powers relative to municipal government and affairs have the effect of legislative enactments. It has power to determine what public improvements shall be made, how the cost thereof shall be paid and the district which shall be assessed to pay the cost.

The courts will not declare its ordinances invalid, unless clearly violative of some constitutional provision or unless fraudulently enacted or clearly arbitrary and unreasonable. The burden is, of course, on the party attacking the ordinance to show the necessary facts from which the court can conclude that it is fraudulent, arbitrary or unreasonable. The court will not so declare except in extreme cases.

That land belonging to a cemetery association is subject to assessments for local improvements, such as sewers, is not an open question in Missouri. There is no provision of our constitution or of the Constitution of the United States exempting such land from assessments for local improvements, and, of course, in the absence of such constitutional provision, that question is not open for review in this court.

The position first taken by plaintiff in error in this case was that its lands were exempt from the assessment.

That question was settled by the Supreme Court of Missouri.

Mullins v. *Cemetery*, 681.

Its next contention was that a separate tax bill should have been issued against each burial lot in the cemetery. That question was settled by the Supreme Court of Missouri, adversely to it.

Mullins v. *Cemetery*, 259 Mo. 142.

No writ of error was sued out to this court in that case.

Its last contention is that there should have been two tax bills issued instead of one. That contention was overruled by the Supreme Court of Missouri.

Mullins v. *Cemetery*, 268 Mo. 691.

The plaintiff in error in this court seems to base its case on two propositions:

1st. That it has been denied due process of law.

2nd. That it has been denied the equal protection of the law.

As to the first there is no shadow of reason for sustaining its position. The City Charter afforded it every opportunity to be heard in court as to the liability of its land for the assessments, and under the repeated decisions of this court it has had due process of law.

Carry v. *Campbell*, 154 U. S. 629.

As to the second, it insists, if we fully understand its position,

1st. That the city had no right to embrace its land in Sewer District 218; that the city might have established the sewer district so as to have excluded its land.

In *Spencer* v. *Merchant*, 125 U. S., l. c. 355, this court said:

> "The legislature in the exercise of its power of taxation has the right to direct the whole or a part of the expense of a public improvement such as laying out, grading or repairing of a street to be assessed upon the owners of lands benefited thereby; and the determination of the territorial district which should be taxed for a local improvement is within the legislative discretion."

(The ordinance establishing sewer district 218 was passed by the common council of Kansas City August 2, 1901.)

In *Wagner* v. *Liser, et al.*, 239 U. S. 207, this court said:

> "The legislature unless restricted by the State Constitution can create such districts directly, or as in this case it may provide for their institution through a proceeding in the courts in which the parties interested are cited to appear and present their objections if any. The propriety of a delegation of this sort was a question for the state alone and with respect to districts thus formed whether by the legislature directly or in an appropriate proceeding under its authority, the legislature may itself fix the basis of taxation or assessment, that is it may define the apportionment of the burden and its action cannot be assailed under the fourteenth amendment unless it is palpably arbitrary and a plain abuse."

In *L. & N. R. R. Co.* v. *Barker Asphalt Co.*, 197 U. S. 430, this court said:

> "The whole cost of the improvement is distributed in proportion to area, and a particular area

might receive no benefits at all, at least if its present and probable use be taken into account. If that possibility does not invalidate the act, it would be surprising if the corresponding fact should invalidate the assessment.

Upholding the act as embodying a principle generally fair and doing as nearly equal justice as can be expected seems to impart that if a particular hardship arises under it in its natural and ordinary application that hardship must be borne as one of the imperfections of human things, and this has been the implication of the cases."

There is no imputation in this case nor can there be, that the city council in fixing the boundaries of district 218 acted fraudulently or from any other motive than a desire to serve the interest of the city and its citizens according to its best judgment. Under the plan by which sewers are constructed in the various sewer districts it is not usually expected that sewers will be built in all portions of the district at one time. Sewers may be built from time to time as the comfort or health of the people of the district may require. A sewer may be built in one part of the district to-day, in another part at a later day, but whenever built the whole district is taxed for the cost of each sewer.

A sewer built now may not seem to be of special benefit to some property owner in the district remote from the sewer. Nevertheless being in the district he must be assessed. And when a sewer is built accessible to him the other property owner must contribute to the cost.

Any property owner in the district would have as much reason and as much right to claim that he should have been left out of the district as has plaintiff in error.

2nd. The plaintiff in error is not denied the equal protection of the law because one tax bill was issued instead of two. But one bill was necessary; the plaintiff in error was the owner of all the property; it had possession and control of all of it. It was one tract or parcel, enclosed by one fence.

The conveyances or certificates issued by it to various persons vested in them no more than a mere easement or right of sepulcher so long as the grounds were devoted to cemetery purposes. Admittedly plaintiff in error not only held the fee to a portion of the land, but a reversionary interest in the balance of it.

It would have been impractical if not utterly impossible to have arrived at any correct description of the parts of the land devoted to burials. A grave scattered here and there over a portion of the ground. Moreover if it had been possible to segregate the part which the association admits it owns in fee from the part to which it has the reversion it could and should have done so, and it could have relieved itself by complying with Section 18, Article IX of the charter. Neil vs Ridge 220 Ill

It is claimed that other cemetery grounds had been placed in districts to themselves. Even if such be a fact it does not affect this case because there is nothing in the record to show that other cemeteries were similarly situated. There is nothing to show whether or not other

cemeteries in the city were larger or smaller, whether the topography of the land was similar or whether such cemeteries were in a congested district of the city or otherwise. Hence it was discretionary with the city council to embrace this land in district 218, if it deemed proper to do so. If such be a fact, there is nothing to show that the city council did not have good reason for establishing this district as it did.

> "It is not the purpose of the 14th amendment as has been frequently held to prevent the states from classifying the subjects of legislation and making different regulations as to the property of different individuals differently situated. The provision of the Federal Constitution is satisfied if all persons similarly situated are treated alike in privileges conferred or liabilities imposed."
>
> *Field* v. *Barber Asphalt Paving Co.*, 194 U. S. 618.

3d. It is contended further by plaintiff in error that there was no necessity for said sewers so far as it is concerned, and that it received no benefit therefrom. As to the necessity for the improvement it is sufficient to quote from this court *Field* v. *Barber, supra*:

> "The necessity of such improvement is a matter of which they (the Board of Aldermen) are the exclusive judges and their judgment is not to be interfered with by the courts except in cases of fraud or gross abuse of power. * * * The law has vested this power in the representatives of the city, and the courts are not at liberty to determine whether the judgment is exercised wisely or unwisely."

As to the question of benefits, the evidence shows and the court below found that the property was benefited.

It clearly appears that the natural course of drainage of the land was towards the sewer constructed on Cleveland Avenue. There was no outlet for this drainage other than into the sewer at Cleveland Avenue. But for this sewer a pond or lake, a menace to health, would have been created on the land of plaintiff in error, which would have rendered worthless for burial or any other purpose a portion of the land at least 100 feet wide by 200 feet long, and ten to fifteen feet deep, an area of approximately twenty thousand square feet which has been reclaimed or saved. Also there are two closets upon the land which could be, and ought to be connected with the sewer.

It is apparent therefore, that there was a necessity for the sewer, and that the same benefited the property.

Even if the city had seen fit to establish a sewer district composed of the cemetery lands alone, there could not be any possible outlet for the drainage therefrom other than into and through the sewer on 23d Street or Cleveland Avenue.

We respectfully submit that there is nothing in this case which shows that the provisions of the fourteenth amendment have been in any manner violated, and we respectfully ask that the judgment of the Supreme Court of Missouri be affirmed.

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